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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KPM Analytics North America)
Corporation,)
Plaintiff,)
vs.) Civil Action No. 21cv10572-MRG
Blue Sun Scientific, LLC,)
The Innovative Technologies)
Group & Co., Ltd., Arnold)
Eilert, Michelle Gajewski,)
Robert Gajewski, Rachael)
Glenister, Gregory Israelson,))
Irvin Lucas, and Philip)
Ossowski,)
Defendants.)

BEFORE: The Honorable Margaret R. Guzman

Motion Hearing

United States District Court
Courtroom No. 2
595 Main Street
Worcester, Massachusetts
October 3, 2023

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Margaret R. Guzman, United States District Judge, United States District Court, District of Massachusetts, at the Donohue Federal Building & United States Courthouse, 595 Main Street, Worcester, Massachusetts, on October 3, 2023.)

THE CLERK: All rise.

Court is now open. You may be seated.

Case No. 21-10572, KPM Analytics North America Corporation versus Blue Sun Scientific.

Counsel, please note your appearance for the record.

MR. GUTKOSKI: Good morning, your Honor. Good to see you again.

THE COURT: Good morning.

MR. GUTKOSKI: John Gutkoski and Kevin Mosier from Sunstein on behalf of plaintiff KPM. And with us are our cocounsel from the trial, Mr. Scott Magee and Ms. Paige Zacharakis. Also here is the head of KPM, the executive vice president, Mr. Eric Olson.

THE COURT: Good morning to all counsel. Thank you.

MR. WILSON: Good morning, your Honor. Dallin Wilson on behalf of the individual defendants, Arnold Eilert, Robert Gajewski, Rachael Glenister, and Irvin Lucas.

MR. RITCHIE: Good morning, your Honor. George Ritchie on behalf of the entity defendants, Blue Sun Scientific

1 and Innovative Technologies Group.

2 THE COURT: And good morning to both of you. It's
3 good to see all of you again.

4 We have -- I've received all of the filings, and I
5 have taken a significant amount of time reviewing them and
6 reviewing the -- the jury verdict slip and thinking about the
7 case.

8 So I'm going to -- I know that you -- I hope that you
9 did receive some information about the order of argument that
10 we'd like. I will not limit your argument. You may argue to
11 whatever extent you wish. This is a very important piece, and
12 so let us start with if either party wants to make an opening
13 statement, you may do so, if you'd like. It's completely up to
14 you.

15 MR. GUTKOSKI: I don't know that we need a global
16 opening. Instead of openings, I'd think we'd just move on
17 to argument.

18 THE COURT: Very good. Okay. Thank you. See,
19 win-win for both sides right now.

20 So let's hear regarding -- let's see, I've got that
21 little...

22 All right. I've got it right here. Thanks. This is
23 regarding the permanent injunction, and on -- for KPM, and
24 that's Motion No. 1.

25 So let me hear you, please.

1 MR. GUTKOSKI: Thank you, your Honor.

2 Again, John Gutkoski on behalf of KPM.

3 All the defendants agree that KPM is entitled to a
4 permanent injunction. The only question that they raise in
5 their oppositions, their limited oppositions, is the scope of
6 that. KPM seeks an injunction pretty much the same as the
7 preliminary injunction; and, your Honor, we did just note for
8 the record that we did file yesterday a corrected version of
9 our proposed order because we had copied the preliminary
10 injunction text over to the permanent injunction and hadn't
11 adjusted some of the terms in terms of the duration of the
12 action versus a permanency, et cetera.

13 So we did file that yesterday and would ask that the
14 injunction in the form as entered yesterday be entered.

15 The defendants want to carve out an entire category of
16 misappropriated trade secrets, misappropriation conduct that
17 violated the contracts of the individual defendants and that
18 the entity defendants tortiously interfered with as a result of
19 promoting and permitting that conduct.

20 KPM disagrees with that carve-out.

21 Specifically, the defendants say, we'll agree not to
22 use the software, the UCal software that generated the
23 application notes and the data that we used to create the
24 application notes and create the calibrations for the
25 individual customers, such as posts that Mr. Gajewski and

1 Mr. Eilert used the software and data to make those
2 calibrations. We'll agree not to do that. But don't hold us
3 to the third category that the jury found us responsible
4 for -- for misappropriating mainly all the customer
5 information.

6 That's a broad category, customer information. The
7 evidence at trial included that within that category was the
8 identities of the individual customers, the individual people
9 at those customers that had the buying decisions that were the
10 contacts of the defendants when they worked for us at KPM and
11 then used those contacts and emails and connections, the
12 knowledge of the type of KPM instrument that they had, the type
13 of equipment, its timing, when it needed to be serviced, the
14 forms that were used in order to -- that the customers were
15 familiar with and comfortable with to have their -- their
16 machines serviced, the pricing, the revenue, the fact that they
17 used our pricing and tried to undercut it in order to set their
18 pricing. All of that is within the bucket of customer
19 information that the jury found that they misappropriated.

20 The defendants, the individual defendants in Blue Sun
21 says, Don't hold us to that category. And ITG says, Don't hold
22 us, ITG, responsible to any injunction at all. You can
23 permanently enjoin the others as to the software and the -- the
24 data sets, but don't -- don't have it extend to ITG.

25 KPM finds no support in the record for any of the

1 carve-outs that the defendants seek. And we should make no
2 mistake as to why we are here, why we have gone through three
3 years of litigation, why we had to all endure a long trial of
4 all this information, even after a preliminary injunction was
5 set, a relatively rare occurrence in trade secret cases.

6 We went through all of that, because the defendants
7 forced us to do so, because they are playing the long game
8 here.

9 It was clear and uncontested at trial that these
10 analyzers, this near infrared analyzer market is involved
11 with analyzers that last ten, 15 -- Mr. Wilt said even up to
12 20 years. They are trying to play this out. They made clear
13 at trial, their own admissions on this witness stand, that they
14 were pursuing a service-to-sale model. The reason why they
15 tried to migrate and succeeded in migrating those customers
16 relationships, those connections, those contacts, those
17 opportunities of service was not to get \$5,000 a pop for a
18 service visit, but to get to sell the 50, 60, \$70,000 analyzer
19 when that customer, that unit needs to be replaced.

20 And we don't know when a given analyzer will need to
21 be replaced, when a customer will want to and need to make that
22 replacement. They're hoping that yes, the jury found them
23 liable for the damages that were awarded for their -- their
24 misconduct to date, but they are hoping that there is an end
25 that you won't enjoin them and stop them from continuing to

1 misuse those relationships, and they will be able to satisfy
2 whatever judgment they have against them and then make the next
3 sale in three years, five years, ten years.

4 That's why they secretly diverted all that
5 servicing -- those servicing opportunities. That's why they
6 hid what they were doing and lied about it, and that's why
7 they've dragged us through the -- through the trial that they
8 did.

9 In order for KPM to know, even if it was possible to
10 know and identify now when we will be harmed in the future, we
11 would have had to engage in hypotheticals. We would have had
12 to interview or depose each customer. We would have had to ask
13 them how do you feel about us now; how do you think you might
14 feel about us in the future; are you likely to buy a Phoenix,
15 because Mr. Gajewski or Mr. Eilert or Ms. Glenister handled
16 your account before and now they're over at Blue Sun. When do
17 you see yourself anticip- -- when do you anticipate buying the
18 next unit? Why don't you buy multiple units? What are our
19 chances of convincing you to stay with us? What are our
20 chances of convincing you not to say not epochs on both your
21 houses, we're not going to buy a SpectraStar or a Phoenix;
22 we're going to go with a Foss instrument; we're going to go
23 with another manufacturer. Even if we could have gotten
24 answers to those questions, they would have been best been
25 hypothetical.

1 We presented the best evidence we had in terms of what
2 their misconduct was, but we cannot predict into the future
3 what their actions will bear in terms of fruit that they hope
4 to achieve down the line. The only way to present that type of
5 nebulous harm, irreparable harm, it can't be solved by a
6 verdict at a defined point in time is with an injunction.

7 We arguably could have asked for an injunction now
8 based upon the evidence at trial to ban them from selling any
9 Phoenixes. If your Honor recalls, the evidence at trial was
10 clear, they sell one unit, one Phoenix. The only difference
11 between whether it's used for chocolate or whether it's used
12 for cereal or whether it's used for wheat or whether it's used
13 for flour is how it's calibrated, and they established in the
14 marketplace the only difference between their different uses of
15 their Phoenix machine for different constituents, for measuring
16 different constituents, was with our data interpreted by our
17 software in the application notes that they put out into the
18 world and used to market those. We could have said we think
19 that infects all of their sales, don't let them sell this
20 product any more. We're not asking for that.

21 We're asking for a permanent injunction of limited
22 scope that merely says don't leverage your relationships, don't
23 use our customer information to service our machines and
24 continue infecting those customer relationships going forward,
25 and don't sell your Phoenix analyzers for ITG and Blue Sun to

1 any of those customers that you previously had interaction with
2 in selling or attempting to sell for us at any time since you
3 created Blue Sun, July of 2018, going forward.

4 If you want to sell those machines anywhere else in
5 the marketplace, internationally, nationally, throughout North
6 America, as most of the testimony was focused on at trial,
7 Godspeed to you. We're happy to compete with you.

8 We're only asking for an injunction that says because
9 we cannot determine now and won't be able to determine whether
10 or not any of our customers are buying your machine in the
11 future due to your misconduct or due to some sort of fair
12 competition in comparison between our units, stay away from
13 those customers.

14 THE COURT: Even if they already are customers? If
15 they are already -- if they have already had contacts prior to
16 the start of the suit or prior to the -- the issuance of the
17 injunction? It's really very important, especially because
18 this going forward, it doesn't address a past wrong. It's
19 trying to prevent a future wrong, which is, you know, fraught
20 with peril. So we need to be as specific as possible, and by
21 that I need to know are you suggesting that if they had reached
22 out to someone and they mistakenly thought it was actually KPM,
23 they're having the servicing done, and then they continued to
24 have a relationship, and then they have a good relationship now
25 with whoever is the service provider, whether or not it is one

1 of the named individuals or someone working for Blue Sun,
2 should they -- should that company be prevented from -- if they
3 decide to further their relationship, at what point are we
4 stepping in and preventing a private enterprise from making a
5 business decision that they may wish to make even knowing all
6 of the information. Maybe it requires a disclaimer, or maybe,
7 you know, this relationship is tainted by, you know, behavior
8 that was determined to be wrong and people are held accountable
9 in civil court for it. I don't know. But when you're talking
10 about the going forward, it becomes really important for us to
11 understand what it is that you're talking about, what is the
12 entire spectrum of people and entities that we should be
13 thinking about, and what is the specific behavior that we
14 should be trying to enjoin.

15 So I would like -- I think this is going to be a very
16 important issue, not just for both parties, but also for the
17 customers that already exist that may have had a relationship
18 with one or both. So if you could be as specific as possible,
19 counsel.

20 MR. GUTKOSKI: Directing the Court to the evidence at
21 trial. The evidence at trial was that prior to the formation
22 of Blue Sun and the misconduct by Mr. Lucas in establishing
23 secretly Blue Sun while still taking a pay check from KPM and
24 recruiting the other individual defendants over. The only
25 sales of the Phoenix, which was then called the M5 analyzer by

1 ITG was to the forage community, the agricultural uses that
2 Mr. Wilt testified when he brought his unit here out into the
3 center of the courtroom and showed it to the jury. There were
4 no customers of ITG or that ITG was focused on that overlapped
5 with KPM until Mr. Lucas approached Mr. Wilt, came up with this
6 plan, and launched into it establishing Blue Sun as the
7 marketing arm for the M5.

8 And so the evidence at trial is that there is no set
9 of overlapping customers that your Honor suggests might be --
10 fall into a category that -- that the defendants had prior
11 relationships with separate and apart from the misconduct that
12 was presented at trial and -- and found liable by the jury.

13 Second of all, there is no evidence whatsoever that
14 any sort of disclaimer or disclosure would have any impact on
15 buying decisions or ameliorating any sort of harm, and so
16 there's nothing in the record that would support that type of
17 solution moving forward addressing the -- the established harm
18 to KPM.

19 Furthermore, it is inappropriate and a further breach
20 of their contracts for the individual defendants to even
21 contest the imposition of an injunction going forward. Each of
22 their contracts was put into evidence. In each of those
23 contracts they not only agreed not to misuse the trade secrets,
24 and not to misuse any confidential information, but expressly
25 agreed that any act of doing so would entitle KPM to injunctive

1 relief, and, therefore, the Court should not even entertain
2 their arguments that -- the individual defendants' arguments
3 that a permanent injunction against them for misusing the
4 category of customer information, which is included under the
5 broad definitions of confidential information and trade secrets
6 in those agreements should not be enjoined.

7 By extension, the corporate defendants, who were found
8 to tortiously interfere with those very same contracts should
9 not be heard to contest the agreed to use of injunctive relief
10 in order to prevent future harm.

11 THE COURT: And what -- and then another -- a very
12 serious question that I have and can't -- don't -- because I
13 don't really -- excuse me -- I sort of understand the industry
14 from the perspective of as much as maybe the jurors understood
15 it, which was probably very -- not -- not the specifics of the
16 calculation formation, but there already are people who have
17 had contact with former employees of KPM, and these companies
18 have already done work with them.

19 Is there -- is there intended that -- that any, you
20 know, how do we -- we might be able to prevent future contact
21 by saying these -- these companies have a relationship with
22 KPM, and you cannot go from your former service and reach out
23 to them, but are there -- are there companies and are there
24 those in place where you can't separate the relationship that
25 the new comp- -- the company has made with the employee who was

1 a prior employee with KPM.

2 So are there any people who may be doing business or
3 have done business with both places that may themselves wish to
4 go out? They may make a choice. They may say we kind of like
5 the work that we've gotten out of Blue Sun and we're okay with
6 changing.

7 What is the limit on that company's decision-making as
8 to -- because you can't take any of these individuals and
9 literally, you know, like the men in black where they zipped
10 the memory, you know, just by wearing some funny glasses.
11 That's -- that's fantasy, and I think asking the employees to
12 wipe away their institutional knowledge is also sort of
13 fantasy.

14 So the question is what -- what do we do with the
15 companies that wish to do business that were prior?

16 Now, I understand you indicate that they only worked
17 with the forage community. I cannot order somebody to only
18 work in a particular industry, but what if the industries -- you
19 know, what if the offshoot is that they still want to work with
20 Blue Sun? They want to enhance their relationship. They want
21 to buy things with them. What -- what then with those people?

22 So these are vexing questions, and I'm asking because
23 I don't know the answer, and maybe no one in this room has the
24 exact answer, but it certainly is the realm of what the
25 injunction portends that we need to address.

1 MR. GUTKOSKI: A couple of points on that from the
2 trial record, your Honor.

3 First of all, what's -- what -- what -- one way of
4 looking at -- at the question that your Honor proposes is -- is
5 under the balance of hardship prong of an injunction. The
6 testimony at trial was that ITG and Mr. Wilt, who again owns
7 all of this, said that they don't need to go after KPM's
8 customers. They don't need to sell to KPM's customers, because
9 they designed the M5 and marketed it as the Phoenix through
10 Blue Sun to go after competition from another competitor, FOSS,
11 and FOSS's customers. And so they said at the time of the
12 injunction, the preliminary injunction, they said at the time
13 of renewing and when they challenged the preliminary injunction
14 and the Court left it in place, and they said here at trial,
15 we're interested in pursuing FOSS. And so an injunction that
16 limited them from pursuing KPM's SpectraStar customers would
17 not -- would not burden them and not -- not harm them in any
18 way comparative to the damage to KPM.

19 Second of all, it is clear from the evidence at trial
20 that Blue Sun exists solely and is solely composed of former
21 KPM employees. There are no Blue Sun employees that are not
22 out there working for Blue Sun with their KPM baggage, if you
23 will.

24 They know who they interacted with. They know the
25 customers that they dealt with for KPM. They're the ones in

1 the best position to say, okay, I can go pursue the entire
2 world of near infrared analyzer buyers. I just need to stay
3 away from this narrow subset of the ones that me and my half a
4 dozen colleagues -- we're not talking about hundreds of people
5 here. We're talking about a very set number of employees
6 dealing with a very set number of customers; however, one of
7 the proposals that the defendants object -- suggest is well, if
8 you're going to go do an injunction going forward, and you're
9 going to limit us to not use -- not approach those customers
10 and not continue to misuse the customer misinformation category
11 of trade secrets, for which we were found liable, just give us
12 a specific list, just give us a -- give us a list of the 40 or
13 so that came out at trial.

14 The problem with that specific list, your Honor, is
15 that we were unable to determine the full number of customers
16 that they had inappropriately reached out to and serviced
17 because of their spoliation of evidence, because of their
18 destruction of their email records, which is the primary way
19 that they communicated with these customers. And so we think
20 it appropriate to have a similar definition of the limited
21 customer base that they are prohibited from approaching being
22 any of the people that they, that handful of employees, which
23 again is the entirety of Blue Sun and the entirety of ITG's
24 marketing efforts for the M5 Phoenix. They know who they
25 approached, they know the people that they approached, and

1 they're in the best position to make sure that they stay away
2 from, again, just that set.

3 Now, in terms of the interests of the consumer of
4 the -- of the customer, there is no way, we think, on this
5 record due to their misconduct for them to continue
6 to -- certainly to service our units, but also to sell going
7 forward to those customers given the way they have contaminated
8 those relationships and given the way that they stole those
9 relationships and given the way that they hid the stealing of
10 those relationships. That's on them. That's -- that -- that
11 is a vexing question. That is a level of challenge, but that
12 is -- the burden of that should be placed on the defendants,
13 because it is their willful conduct that -- and deliberative
14 conduct that finds us in this position.

15 If there is any doubt that an injunction is essential
16 here, it's their conduct after the preliminary injunction that
17 should definitively answer that.

18 As set forth in the briefing, there are two customers
19 to which defendants made sales of multiple analyzers, and those
20 customers were prohibited. They are R&R Machine, and they are
21 Idahoan. When we challenged them on this, the details of that
22 and the fact that they violated the preliminary injunction were
23 not allowed to be presented to the jury, because we weren't
24 able to tell them about the injunction; however, the record is
25 clear that those both in terms of what was presented at trial,

1 that those sales were made; and in the post-trial record, that
2 those were customers that -- that were prior KPM customers and
3 enjoined. Defendants offer two different set of excuses.

4 With R&R Machine, they offer the testimony of
5 Mr. Lucas in an affidavit, and for the -- for the reasons that
6 we went through at length during the trial, KPM suggests that
7 the Court look at the very least askance at Mr. Lucas's
8 explanations and testimony. However, it is clear that they
9 made the sales of Phoenix machines to R&R about a dozen of them
10 now.

11 Mr. Lucas claims now those weren't Phoenix machines,
12 those were Phoenix machines that we took the Phoenix name off
13 of. We took the Blue Sun and ITG name off of and let R&R put
14 their own moniker on it, put their own name on it. And yet at
15 deposition, he made clear when asked, when specifically asked,
16 when I asked him, What's the R&R analyzer? His answer was, Oh,
17 so that's a Phoenix just with R&R's logo on it and R&R's
18 branding. He had admitted at his deposition that they were
19 Phoenix machines and yet tries to tell this Court now oh, no,
20 they weren't. The Court should reject that and find it to be a
21 violation of the preliminary injunction.

22 The same thing with Idahoan. To make sure that the
23 understanding is clear, Judge Hillman initially set a -- his
24 preliminary injunction in August of 2021, and it said don't
25 sell to any customers that you previously sold to for KPM after

1 the July 2018 date, July 2nd, 2018.

2 Then there were some sales to the U.S. Government to
3 the Department of Agriculture. And we raised that as a concern
4 with his Honor. And defendants said, Well, wait a second. The
5 Department of Agriculture, the U.S. Government, they're all
6 over the place. They have hundreds, thousands of different
7 locations. And so Judge Hillman revised the order in December
8 of 2021, that's ECF 120, where he said if there are different
9 locations, if they have independent buying decisions, in terms
10 of the people at that location making a decision, and they
11 haven't been in any way impacted by another location that you
12 sold to at KPM, you can still sell to that new location, that
13 untouched location. That's the clarification that he made.

14 So they admit that Idahoan was one of our customers.
15 They made a bunch of sales to Idahoan after the injunction.
16 The excuse is, Oh, the decision-makers that we sold to were at
17 Idaho Falls, one location. There were five other locations.
18 We sold to one of the other two so we're in Judge Hillman's
19 carve-out.

20 But the evidence at trial is clear, Trial Exhibit 163,
21 that the director of quality assurance located at Idaho Falls
22 is the one that had the ability to direct buying decisions for
23 the near infrared analyzers for all the others and specifically
24 sent the email that is Exhibit 163 putting a hold on their
25 buying decisions at each of those other locations, including

1 the two that they have sold to. They knew, they know now as a
2 result of that being presented at trial, and yet they still
3 tried to say, oh, no, it was approp -- we could sell to them
4 because they were independent. Clearly, not the case on the
5 face of the black and white record of that exhibit, your Honor.

6 They didn't stop. They're not going to stop. They're
7 going to look for every way to try to extend this out, benefit
8 from the extended timeline of these machines and buying cycle
9 of these machines. They're going to continue to harm us.

10 Our only recourse, absent an injunction, is to sue
11 them again, go through this all again. When they sell another
12 12 to another customer to then inquire, okay, why did you buy
13 that? What did they tell you? What did they use? Did you
14 make that decision based upon the relationship that you had
15 through Ms. Glenister, Mr. Gajewski, Mr. Lucas, Mr. Eilert?
16 The prior understanding that you had of the capability of the
17 Phoenix through our -- the -- the -- the data points and the
18 measuring capabilities that they showed you using our data and
19 software. We would have to get into all that as a matter of
20 factual debate, discovery, and another trial.

21 From an efficiency standpoint, from a justice
22 standpoint, the best way to rectify this irreparable harm and
23 the only fair way is with a permanent injunction as KPM has
24 proposed.

25 THE COURT: Thank you, counsel.

1 All right.

2 MR. WILSON: Your Honor, trade secrets don't last
3 forever, and listening to Mr. Gutkoski up here and reading the
4 briefing that KPM has submitted, they completely ignore the
5 relevant standard that the Court should consider in determining
6 whether to issue a permanent injunction, and that is what
7 amount of time would it take for a competitor in the industry
8 to become aware of the trade secret that's at issue.

9 There has been absolutely no evidence either at trial
10 or in support of KPM's motion about how long it would take any
11 competitor to learn this so-called customer information. We've
12 had issues in the past about that claim -- that -- that trade
13 secret being a little amorphous, because it becomes really
14 important here, because what are we talking about? We're
15 talking about the identities of their customers. We're talking
16 about their preferences. We're talking about how many machines
17 did they own, when did they buy them, things like that. All of
18 those things could be discoverable by another competitor by
19 going to the customer and asking them.

20 Some period of time -- over some period of time,
21 whether it's Blue Sun or whether it's any other customer or any
22 other competitor, they would be able to learn this information,
23 and I would submit that there was absolutely no evidence at
24 trial about how long it took KPM to develop this information,
25 how long it would take another competitor to learn it. In

1 fact, what we heard at trial is a lot of these customers, as
2 you mentioned previously, they have -- they do business with
3 all sorts of companies. None of this is -- these relationships
4 are not owned by KPM. They don't own these customers. They
5 compete for these customers with all sorts of competitors in
6 the industry.

7 THE COURT: But didn't they compete fairly?

8 MR. WILSON: Even if they didn't they compete fairly,
9 but that was beside the --

10 THE COURT: No, they -- they competed fairly, didn't
11 they?

12 I mean is there any allegation --

13 MR. WILSON: You're talking about the other
14 competitors?

15 THE COURT: I'm talking about when KPM started doing
16 business with people and selling what they have to sell, did
17 they steal the customer bases from other people, or did they
18 just -- did they just do what all the industry does, which is
19 go to these industrial -- well, you heard these industry fairs
20 and they -- you know, they talked to the fellow that came from,
21 I think Ohio and came -- lived in Milford, and he was a person
22 in the industry, and you get to know other people in the
23 industry, and you call. That's what -- that's kind of what we
24 think people who are not in, you know, creation of goods, we
25 think that's what happens. People -- it's word of mouth. It's

1 reputation in a community. It's all kinds of things.

2 What we -- I have a job, because it doesn't always go
3 that way. Sometimes people use different means to get that.
4 The question is not whether or not the people that the Blue Sun
5 employees are going to to sell products aren't willing to buy
6 from them, the question is: Is the only way that those people
7 are being approached is because there's an advantage that the
8 Blue Sun employees had that others don't have, which is inside
9 information. It's no different than buying and selling stocks
10 when it's supposed to be public. And you do it because you're
11 gaining an advantage for yourself.

12 So Blue Sun should be able to compete, go to all of
13 those trade fairs, use their rep- -- use their -- to call
14 people and say, listen, if you know anybody in this business
15 who is looking for these, I'm willing to work with them.
16 That's not what has been happening, and the -- the issue that I
17 think is very important, which is that of the loss of an
18 accurate record of who is -- who was approached.

19 We know from the evidence that came in at trial that
20 it wasn't -- I think the most telling information came from a
21 couple of emails in which customers, who had been approached by
22 any one of the individual defendants through emails with their
23 new email came back and said, Wait a minute, is it still KPM?
24 I mean, we're -- oh, okay, so, and in some cases they were
25 directly responded with completely misinformation, oh, we're a

1 subsidiary, or yes, they've turned this, all of this, over to
2 us. That is what the sin of the lost emails are, because if we
3 had a complete guide then they could carve out every one of
4 those people that were previously approached, but we can't.
5 And because of the subterfuge and the false names and
6 the -- and the -- and the dual employment, and all of those
7 things, the jury was -- was convinced that there was a harm
8 here and had the jury had the preliminary -- the injunction
9 information as well, it would have been -- I think it
10 would -- I think separating it out was a very important thing.
11 I think everyone had a better trial and a fairer trial because
12 of it, but I think the jury spoke extremely loudly. What was
13 done can't be undone. There's a -- there's a bell that got
14 rung, and it can't get unrung.

15 And the idea about the creation of a -- I mean we are
16 a nation that's founded on, you know, get out there and do it
17 yourself. Sell yourself, sell your product, and, you know,
18 people will be jealous of you if you're successful, and they're
19 going to try and come at it, but so what. That's what we do.

20 We -- we have an inventive and innovative spirit
21 that -- that makes us the leader in the world for that, but it
22 can't -- but when it's done -- when it's done unfairly how do
23 we find a way to let Blue Sun go and become successful if they
24 are intended to do so, but only fairly. And this isn't
25 intended to label anybody, like, you know, as a permanently

1 bad. This is intended to allow the efforts of a company to
2 maintain the advantage that they have obtained through lawful
3 means while also allowing Blue Sun to compete on a -- on
4 a -- compete on a level playing field.

5 I don't want to extend the preliminary injunction in
6 any way that is unfair. These people aren't labeled anything.
7 They're just employ- -- they're now people who want to do work
8 for someone else, and they want to do -- they want -- but they
9 have to do it fairly. And since we don't know how unfairly
10 their advantage was, that puts the Court in a very difficult
11 position as far as what the ask is.

12 And so I -- I completely understand that. Now, I do
13 not intend to make this so onerous that Blue Sun is unable to
14 compete and be in business. That's not what this is intended
15 to do.

16 So I appreciate that the trade secrets don't last
17 forever. They don't. I mean, Mr. Wilts is a -- he's testament
18 to that right. He lost the right to continue to sell and
19 control a product that he made, which was an incredible
20 product. He got paid for it. So he created something else.
21 Excellent. Good. I mean that is the -- that is magic.

22 How do we, however, under the circumstance that we
23 have, Attorney Wilson, how do we narrow it so it doesn't hurt
24 your client's ability to go forward, but it doesn't continue to
25 penalize KPM because your clients did not retain the evidence

1 of their misdoings.

2 So that -- those are the balances --

3 MR. WILSON: Sure.

4 THE COURT: -- and I am not intending to use whatever
5 this preliminary injunction is to stifle competition or to
6 stifle commerce, but it has to be in a way that does recognize
7 some of the very unique facts that came out about this case.

8 MR. WILSON: All right. Let me try to tackle a few of
9 those things.

10 THE COURT: Okay. Good.

11 MR. WILSON: But first is how -- you said how do we
12 deal with what's happened. Well, we dealt with it because the
13 jury ordered a pretty substantial judgment against Blue Sun and
14 KPM and the individual defendants. That addresses the past
15 wrong that you talked about.

16 And so the question going forward is how long does
17 this customer information maintain its trade secret status,
18 because really the issue here they're saying is you can't sell
19 to these customers without -- it's sort of like an inevitable
20 disclosure argument. You inevitably will utilize these trade
21 secrets, this customer information; therefore, the only way to
22 prevent you from doing that is to cut you off from selling to
23 them at all. And I think that's the real problem is because
24 that assumes this customer information maintains trade secret
25 status forever. At some point it loses its trade secret

1 status, and I would submit that our clients have been enjoined
2 for over two years now from selling to these customers. And so
3 to the extent there was some kind of unfair advantage, some
4 kind of harm to the relationship, KPM has had over two years to
5 go to those customers, explain what happened, explain -- and
6 they've done that. You know, Mr. Gutkoski said, well, they
7 have to go and they'd have to depose all these customers. No,
8 they wouldn't. They would go call on their customers like
9 every other business does and explain to them and market to
10 them and say, yeah, our products and services are superior.
11 You should continue to buy from us. It didn't come up in the
12 trial because of the injunction issue, but they did send a
13 letter to every customer saying we are not Blue Sun. They are
14 not authorized to do these things. And since the jury verdict,
15 they've widely publicized it. I am convinced that there is not
16 a single customer in this industry that is unaware of this
17 lawsuit and unaware of the outcome.

18 So again, the question has to be how long do we cloak
19 this customer information as a trade secret. I would submit
20 that it would be unprecedented. There has been no case that
21 has been cited by KPM in any jurisdiction that has imposed a
22 lifelong injunction, a perpetual noncompete effectively based
23 on something like customer information. Because again that
24 goes back to the point how long does the information stay a
25 trade secret.

1 And so, you know, Ms. Glenister, for example, I think
2 the evidence showed she has been in the industry working for a
3 few years. Is she going to be banned from contacting these,
4 you know, some population of customers from the rest of her
5 career because of this? I -- I would submit that this would be
6 the first time that any court has ever issued such an
7 injunction.

8 THE COURT: Well, if she could tell us who she
9 contacted when she was in a dual employment or she was -- she
10 was exercising subterfuge, if she could tell us that then we
11 could -- it could be limited.

12 MR. WILSON: But even that limitation, I think, would
13 be improper because it would say those people that you worked
14 with or you contacted, you can never speak to them again about
15 these products or services.

16 And again, the only way you could do that --

17 THE COURT: Why?

18 MR. WILSON: Well, if --

19 THE COURT: If the information that she obtained was
20 not her own information, again --

21 MR. WILSON: Yeah.

22 THE COURT: -- trade shows, you know, contacts,
23 someone calls you up and says, hey, I know this guy kind of
24 does the same thing that -- you should give him a call. I
25 think that -- you know, that's innovative. That's -- that's

1 work ethic. That's using your noggin and going at the business
2 that you have and becoming good at it. That's not theft.
3 That's not subterfuge. That's not cheating. That -- what they
4 did was cheating, and since they were -- inadvertently
5 destroyed the complete record of their cheating, we don't know
6 to whom they contacted and made certain promises or maybe they
7 made -- maybe they said negative things about KPM. Well, who
8 knows what they did. You know why? Only they know. Only they
9 know why they were able to walk into this court empty-handed,
10 and that is -- so they put themselves in this position, not
11 KPM. They put themselves in this position, because if we knew
12 who they had contacted you could narrow that field, completely
13 narrow that field. It's not up to the KPM to call their
14 customers and say, Did you get a funny email from one of our
15 employees? What the heck? I mean how are they supposed to
16 maintain a business relationship with someone, and they sound
17 like they don't even know who's on first.

18 It is not -- I -- it is not intended to be a
19 punishment to Blue Sun. It's intended to recognize a harm that
20 a jury found and a judge found and -- and so we want to do that
21 in the way that is most fair to all parties. It's not fair if
22 they are unable or refuse to say who they already reached out
23 to. To call what them -- you know, to say what we're doing is
24 preventing them from making a living is really fundamentally
25 opposite to what the jury found. They found that they

1 were -- they were not making a living. They were making -- they
2 were making money off somebody else's living. And
3 that -- that's really -- that's really what's at heart here.

4 So, Attorney Wilson, I want to fashion this
5 preliminary injunction in the narrowest way that we can, even
6 if it's -- you know, I'm not certain whether or not it's
7 something that can be narrowed by years or decades. And I
8 think that that's -- if that's possible, that's appropriate,
9 because this information doesn't last forever. The technology
10 changes. And then KPM has to continue to sell to their own
11 clients. They have to give them a reason to stay with them
12 anyways.

13 So I'll work with you to the extent that we can to
14 fashion a remedy that is not intended to be just a harm. It's
15 intended to address what the wrongs were litigated. So -- and
16 I appreciate -- so we'll think about it in that -- in those
17 terms because, you know, this is a sort of unusual situation.
18 I guess every case has their own complexities, but we are
19 talking about people who -- you know, these are not like
20 defense contracts, you know, we're not -- this is a much bigger
21 industry. This is much more mainstream. These are companies
22 and not the federal government, which is that whole issue
23 regarding the federal government was -- we don't know if
24 they're going to be paying their bills in 45 days, so we might
25 not want to be thinking about using them for contracts.

1 So I'm sorry that I interrupted you, but I really want
2 you to give -- there's no doubt that there has to be -- there
3 has to be some ongoing control over this situation. So for
4 your clients, what's your best -- what's your best request for
5 me --

6 MR. WILSON: Sure.

7 THE COURT: -- to narrow it so it doesn't harm them
8 permanently.

9 MR. WILSON: So let me address two things. There's,
10 you know, you're taking about the spoliation of evidence.
11 There were hundreds of exhibits in this trial, because Rob
12 Gajewski preserved all of his emails.

13 So any service that Rob Gajewski did, which really was
14 the focus of the trial, none of that was spoliated. There's a
15 reason why there was hundreds of exhibits in this case, and
16 that's because Rob Gajewski did preserve his emails. That's
17 why we had all of the discussion about what Rob was doing, what
18 he was saying.

19 And so we have submitted what I think your Honor was
20 asking for, which is a list. Blue Sun's records show that
21 Mr. Gajewski serviced 30 customers. And I think what's
22 important is, you know, getting back to this sort of service to
23 sales model that KPM keeps bringing up. What the evidence at
24 trial showed that only a very small percentage of customers
25 actually received preventative maintenance service from these

1 companies. I think that, you know, it was sort of like
2 20 percent was sort of the number. Some people were a little
3 bit higher, some people were a little bit lower. But a large
4 majority of these customers serviced their own machines. I
5 think that was undisputed at trial.

6 And so what we offered as the alternative was an
7 injunction that limits Blue Sun, at least the individual
8 employees, from servicing or selling to those 30 customers for
9 another year. So that would be a total of three years.

10 And again, I would submit, you know, the burden I
11 think is on KPM here to still show how long customer
12 information should be protected as a trade secret. But there
13 has been no evidence that certainly it would take more than
14 three years for a competitor to learn this information and to
15 be able to go and to sell to these customers in a way that's
16 fair.

17 I think that -- again, I think the jury addressed the
18 past wrongs that were done. This -- this issue is not about
19 that. Again, it's not about punishing. It's about going
20 forward and what's fair. And I would submit that a perpetual
21 lifelong ban of any kind would be unprecedented. I'm not aware
22 of any case where any judge has ever ordered a lifelong ban
23 from selling to customers based on this type of trade secret,
24 this type of customer information, which changes over time.

25 And so there has to be an end, and we think that three

1 years -- so we're tacking on another year -- is sort of the
2 outer edge of what would be fair here under the circumstances.
3 At some point these customers have to be able to decide who
4 they want to do business with.

5 And after three years, I think KPM would have had the
6 ability to shore up those relationships. I agree they
7 shouldn't have to go to the customer and say, Did you receive a
8 weird email? But I do think they should have to call on a
9 customer within three years and check in and say, hey, how come
10 we haven't been getting service from you, how come -- when are
11 you all interested in buying a new device? You know, these are
12 things that every -- every business in every industry has to
13 do. And what they're saying is no forever, for perpetuity, we
14 should not have to compete against Blue Sun because of this.

15 And again I would just submit that that would be
16 entirely unprecedented, and there's no support for it. At the
17 some point the trade secret ends, and we think that three years
18 for this type of trade secret would be appropriate. So that
19 would be our sort of alternative offer. These 30 customers for
20 another year.

21 THE COURT: Thank you very much.

22 MR. WILSON: Thank you, your Honor.

23 THE COURT: All right. Attorney Ritchie.

24 MR. RITCHIE: Yes, your Honor.

25 Your Honor, I think that later in this proceeding

1 we're going to hear from counsel for KPM that this Court should
2 give great deference to the jury's finding with respect to
3 other issues that your Honor will hear today. So I want to
4 highlight that now, because I think it's important for ITG in
5 its separate opposition to this motion.

6 The jury found that ITG did not misappropriate trade
7 secrets, and I submit that is a significant finding that
8 deserves deference when this Court is considering what to do
9 with respect to permanent injunction.

10 Mr. Gutkoski gave your Honor a slightly abridged
11 version of the history of -- of ITG that went before the jury.
12 In fact, although it is true that the M5 was designed with ITG,
13 your Honor will recall that Mr. Wilt testified that he started
14 a company called Unity Scientific long before KPM was in this
15 industry. He designed the first SpectraStar machine, and that
16 through a series of corporate transactions that business was
17 transferred to KPM.

18 I think it was Exhibits 147 and 148 were the sales
19 records of Blue Sun and ITG that were put into evidence, and
20 your Honor will recall that those records provided the backbone
21 of plaintiff's damage calculation, but those records also
22 contained two separate line items that we tried to explain to
23 the jury. One was were any of these companies in the ITG
24 pipeline prior to the time a sale was made to them by Blue Sun.
25 And your Honor can go back and see there are a number of those

1 companies.

2 Secondly, did those companies even have a KPM machine
3 at the time that Blue Sun had made the sale, and your Honor
4 will see that virtually none of them had a KPM machine at that
5 time. Mr. Wilt said -- and he rattled off a number of names,
6 and I don't have them in front of me -- eight or ten customer
7 names, all the same names that Mr. Olson and the records that
8 KPM introduced. KPM said they were their customers. Mr. Wilt
9 said, Oh, no, those were my customers back in the Unity days
10 when I developed the first SpectraStar machine.

11 So when you combine those undisputed facts with the
12 jury's finding that there was no misappropriation by ITG of the
13 trade secrets, what that means is the jury found -- the jury
14 was not happy and punished ITG for hiring these individuals
15 that had contracts. The jury was not convinced by KPM that ITG
16 had the trade secrets, did anything appropriate with the trade
17 secrets, and it's fair to infer and there has been no evidence
18 otherwise that they're going to do anything with the trade
19 secrets.

20 The SpectraStar, Unity, which became the M5 business
21 existed before KPM got into this industry, and it can exist
22 afterwards without infringing on any KPM trade secrets or
23 rights.

24 Mr. Wilt said, I don't have the KPM trade secrets. I
25 don't need them. That's not how I design my machines.

1 So I'm not here to stand up and disagree with my
2 colleague. I think that Mr. Wilson has submitted an order, a
3 draft order that appropriately reflects what ITG would agree
4 to, but if, in fact, the Court will not adopt that order, ITG's
5 position is there should be no injunction with respect to ITG.

6 Let's recall, ITG is a sale -- is a manufacturing and
7 sales business. They sell machines, and there is nothing and
8 no reason to stop ITG independently from Blue Sun from selling
9 its machines in whatever markets it deems fit. It didn't
10 misappropriate the trade secrets. As long as it doesn't use
11 any enjoined employees or enjoined entities to make those
12 sales, there should be no harm to KPM, and I think that that
13 jury finding is significant, your Honor, and should be given
14 deference when the Court considers fashioning its injunctive
15 relief.

16 I -- the only thing I -- lastly, I'd say, and this
17 probably will come up in other things is that Mr. Gutkoski has
18 cleverly made reference to FOSS machines and foraging, and it
19 sort of seemed to be suggesting to the Court that, well, it's
20 okay if your Honor will exclude those FOSS and foraging
21 machines from the injunction.

22 Well, really, because if your Honor goes back to
23 Exhibits 147 and 148, the vast majority of those customers had
24 FOSS machines at the time Blue Sun made the sale. So KPM
25 convinced this jury for an award of damages based on sales of

1 machines to FOSS customers; and yet now in order to placate the
2 Court's obvious and well-founded concerns about the scope of a
3 lengthy injunction wants to step back and say, oh, it's okay,
4 you can exclude the FOSS customers. I don't think you exclude
5 anybody. I mean I think that ITG should be fair to -- should
6 be free to sell to anybody. But this idea of mixing and
7 matching and hiding the ball as to what KPM really wants is
8 evident in those comments.

9 And I don't have anything further to add, your Honor.
10 I'm happy to answer any questions your Honor has.

11 THE COURT: Well, the jury clearly put the -- the onus
12 of the blame on the trade secrets manipulation or theft on the
13 individual people that actually did it, because that's where
14 the evidence was, but the jury was also not blind to but for
15 Mr. Wilts and ITG there would be no Blue Sun, period, and you
16 can't leave a match, you know, in a pile of wood and maybe some
17 gasoline and with a roomful of pyromanics and walk out and say,
18 oh, my gosh, there was a fire. I'm shocked. The -- that is
19 what Mr. Wilts created. He literally created that. He --
20 Mr. -- the Blue Sun creation may have come from an individual,
21 but the purpose of Blue Sun, the significance of employees from
22 a single company, a company that Mr. Wilts had a history with
23 over an industry of which he had a history with, the jury was
24 not blinded to that. And they -- and they -- those people
25 they -- but for Mr. Wilts they could not and would not have

1 come together as a group. And so to suggest that somehow he
2 gets to say what, what was going on? I had no idea. That's
3 not what the jury said with their verdict. The jury -- I think
4 the jury was very fair to Mr. Wilts that, you know, what those
5 people did, they were grown-ups, individuals, who were -- who
6 were thinking, working individuals, and they made decisions on
7 their own to do things that were improper, and the jury made a
8 determination that they -- that had been proved. But the jury
9 did not say that Mr. Wilts is of clean hands.

10 MR. RITCHIE: I'm not disputing anything your Honor
11 has just said. In fact, I agree with it. I agree that that's
12 what the jury did. But the jury did make a distinction between
13 what it viewed as tortious interference with a contract, which
14 is absolutely what they punished Mr. Wilt for, I get that. And
15 misappropriation of trade secrets what they said did not happen
16 for ITG.

17 The issue with respect to the tortious interference
18 with contract, he has been punished. That issue is to bed
19 absent appeals and whatever happens here today.

20 With respect to the trade secret issue, the Court has
21 to fashion an order that will prevent harm to KPM with respect
22 to its trade secrets while still I think the Court has
23 acknowledged balancing the right of Blue Sun and ITG and the
24 individual defendants from competing in this business, because
25 a flat out bar on competition just isn't warranted and is not

1 appropriate under the law. But there is no reason to -- if you
2 take the jury at its word with respect to the tortious
3 interference count, I think we have to take the jury at its
4 word with respect to the -- the trade secret count, which is
5 there was no misappropriation. And if there's no
6 misappropriation of this customer information by ITG, there
7 shouldn't be any reason why ITG independently of Blue Sun or
8 the individual employees, independently of those people and
9 that entity shouldn't be allowed to sell its machine just like
10 it did before Blue Sun came into existence. And that's the
11 distinction I'm trying to draw.

12 I'm not arguing with your Honor about what the jury
13 did. I agree with you, but I think that if you give the jury
14 credit on the one hand, you have to give them credit on the
15 other hand, and their finding with respect to the trade secrets
16 logically leads the position that ITG is advocating here.

17 Thank you.

18 THE COURT: All right. Thank you very much.

19 Anything further on this issue?

20 MR. GUTKOSKI: Just briefly, your Honor.

21 The only breach of contract that was argued and found
22 and therefore could be the basis of the jury's verdict of
23 breaching of contract is the misuse of trade secrets and
24 confidential information. Your Honor is completely correct,
25 this jury understood exactly what went on here. They held the

1 actual misappropriators liable for trade secrets and
2 misappropriating trade secrets. But they held ITG liable for
3 tortiously interfering with the contracts of those individual
4 actors and then unfairly and deceptively competing under 93A.
5 The underlying actions for both the 93A count and the tortious
6 interference count are the breaches of contract of these
7 individuals, and the only breach that was ever presented or
8 argued is the misuse of information.

9 A breach of a contractual provision which has no time
10 limit and so, therefore, future misuses and -- constitute
11 future breaches to the extent that they are inspired, funded
12 for the benefit of ITG and Blue Sun, then they are similarly
13 within the violations that the jury found them liable for.

14 We are entitled to an injunction for the 93A violation
15 and the tortious interference -- the tort -- of tortious
16 interference of those contracts just as much as we are for the
17 trade secret violation.

18 One additional point I would say is in terms of
19 Mr. Wilson's arguments that there was no evidence as to when
20 these trade secrets might expire, the defendants could have
21 presented that information. The defendants could have said,
22 here's where we reached out to post and said, hey, cards on the
23 table. I'm now at a new company. We're completely separate.
24 We can do what we did before, but understand we are not KPM and
25 we are -- we are going to do this in a way that is completely

1 above board. They didn't present that evidence, because as we
2 all know, that's not how they conducted themselves.

3 THE COURT: But we do know based on the evidence that
4 KPM put on and was -- was reiterated by the defendants' case
5 that generally the machinery here -- first of all, we know that
6 the technology is continuing to evolve. It's continuing to get
7 better and change. We also know that there is a life span of
8 the -- of the equipment, the machines, and I think that we have
9 to recognize that -- that life span. I think what may happen
10 now is that if there -- whenever the -- the injunction can't
11 live forever.

12 MR. GUTKOSKI: No.

13 THE COURT: And I think that -- I think the 15- to
14 20-year period that we've talked about the life span of the
15 machineries I think is an appropriate place to start. I -- so
16 I do not intend on making a lifetime ban on using the
17 injunction for a lifetime period of time.

18 The free market means that everyone means to freely
19 and equally have access to selling their goods. When someone
20 takes an advantage that they -- that they didn't earn, then
21 they -- that -- there is -- there is a penalty for that, at
22 least in the scope of the -- of the client base that KPM has.

23 And -- and I think that that is important. It
24 recognizes the jury verdict, and I think it really is enforced
25 by the facts, but that has to -- that has to have an expiration

1 date at some point.

2 MR. GUTKOSKI: I think -- I think your Honor
3 accurately reflects the evidence at trial that we're talking
4 about a 15- to 20-year time frame, and an injunction that
5 extended for that time frame I think would be acceptable to
6 KPM.

7 I would just lastly say that Mr. Wilson claimed that
8 we had all these -- we can limit ourselves to a -- the list of
9 customers that is in the trial record because we had hundreds
10 of exhibits and --

11 THE COURT: We're going to -- the customer base is the
12 customer base that existed when the individual defendants were
13 fired. They will no longer have had access to the database of
14 KPM from the point of their firing.

15 MR. GUTKOSKI: Could --

16 THE COURT: And that would be the start date of
17 whatever time limit there is.

18 MR. GUTKOSKI: I think that's -- I think that's
19 appropriate. I would just make -- make reference to the fact
20 that we put up the -- and spent an extensive time with
21 Mr. Gajewski on the stand with his -- his disk drives, his
22 thumb drive that was never returned --

23 THE COURT: Right.

24 MR. GUTKOSKI: -- and Exhibit 94, Trial Exhibit 94,
25 where we went through all of the different --

1 THE COURT: Right, which is why whoever the customer
2 base is, and that will be a -- that will be a delineated base,
3 a going-forward period.

4 MR. GUTKOSKI: As a particular point in time.

5 THE COURT: Yes.

6 MR. GUTKOSKI: I think that's appropriate, your Honor.

7 THE COURT: And -- and then I would just say, both
8 parties, you should never discount on a customer always being
9 your customers. You have to keep winning them over. So it's
10 up to KPM and up to Blue Sun to find their way in these
11 industries and -- and, who knows, in 15, 20 years, you know,
12 whether or not either one of these companies will still be
13 doing business as their named company, but I do think
14 that -- that it is pretty clear. I'm -- I'm going to take a
15 look. If there is a going to be a going forward it's going to
16 be limited in time, and it's going to be delineated in
17 specifics, so.

18 MR. GUTKOSKI: Thank you, your Honor.

19 THE COURT: All right. So that's one.

20 Do we need a break? Are we ready to go into Count
21 Two?

22 Thank you.

23 All right. So our next motion is -- let me see. We
24 have the -- KPM's motion for a finding of willful malicious
25 appropriation of trade secrets and for exemplary damages.

1 Motion two.

2 MR. GUTKOSKI: I get that one, too, your Honor.

3 THE COURT: All right.

4 MR. GUTKOSKI: During trial, the Court had concerns
5 with the -- perhaps the best said collateral effect that asking
6 the jurors and suggesting to the jurors in a specific question
7 might have on the overall verdict and determination of
8 liability in asking them whether or not if they found
9 misappropriation it should -- they should also find it to be
10 willful and malicious.

11 That does not -- that concern does not exist now that
12 the Court is the determiner of these issues. Under both
13 the -- the federal and state trade secret acts, the Court has
14 the power to, based upon the evidence presented at trial, make
15 its own determination of willful and malicious, particularly
16 having chosen not to submit that question to the jury, and KPM
17 asked the Court to make such a finding now.

18 I don't believe that there is any debate, any real
19 debate anyway regarding willfulness. Willfulness is a
20 voluntary act committed with an intent to create its results.
21 Even under the cases cited by the defendants, including the
22 *Timex* case from the First Circuit, willfulness includes acts of
23 fraud and similar other acts of misrepresentation.

24 The evidence was replete at trial of not only bad
25 actions but intentional bad actions that included acts of

1 hiding those actions and misrepresenting the truth to not only
2 KPM, who they were continuing to work for and take paychecks
3 from, but also to the customer base that we've been discussing
4 at length this morning.

5 The question is maliciousness, and in asking for the
6 jury question and the question to go to the jury, and an
7 instruction on it, we had a spirited debate and lengthy debate
8 as to the meaning of maliciousness.

9 In both the cases that we submitted at the time of
10 that instruction, in ECF 227, and those submitted in our
11 briefing, the concern that the Court expressed on the record
12 during the colloquy prior to instructing the jury that
13 maliciousness had a -- and requires an act of evil separate and
14 apart from a financial gain and financial injury to KPM is
15 simply not supported by the case law.

16 Defendants rely on the -- the Court's concerns, and on
17 the *Contour Design* case from the District of New Hampshire in
18 2011. That Court found that the defendants in that case acted
19 maliciously on facts with a lot of parallels to those set forth
20 in the trial record and heard by the jury. Exploiting
21 long-term relationships, obscuring the source of goods and
22 services, attempting to conceal that misappropriation, taking
23 as many customers as it could, and now violating a preliminary
24 injunction, all of those have parallels and equal support on
25 this trial record.

1 Moreover, their own case, the *Contour Design* case,
2 looks to the multifactor test from patent law noting that the
3 federal and state trade secret acts are based in part on patent
4 law. The *Read versus Portec* decision sets out a series of
5 factors that says that if the jury finds willful infringement
6 in the patent context should the Court impose exemplary
7 damages. And that's what we're talking about here. We're
8 talking about whether or not there should be a punitive
9 component to the enhancement to the damages for trade secret
10 misappropriation, because their conduct was willful and
11 malicious.

12 Those same factors were applied by the *Contour*
13 *Design* -- by the Court, District of New Hampshire, in the
14 *Contour Design* case in order to find maliciousness.

15 Many of those are similarly met by the evidence here,
16 deliberate copying and use of property owned by the plaintiff,
17 by KPM; lack of a good faith belief in the propriety of their
18 conduct. They hid it. They lied about it. They knew it was
19 improper. They confessed to that on the stand.

20 The acts of litigation misbehavior, here the
21 violations of the preliminary injunction at the very least, it
22 not being a close case. The evidence here was overwhelming in
23 favor of the defendants' misconduct -- in favor of KPM about
24 the defendants' misconduct, the long duration of that
25 misconduct, the fact that there was no remedial activity taken

1 on by the defendants once a complaint was brought. Instead
2 they tried to make additional sales before they were enjoined,
3 and then as we saw with the R&R and Idahoan situations, even
4 after they were enjoined.

5 The motivation of -- of their conduct being financial
6 and for their own financial gain and for our financial harm,
7 and the attempts to conceal their own misconduct, all of those
8 are factors regularly considered under the *Read versus Portec*
9 factors in patent law, and all of them apply here in favor of a
10 finding of maliciousness.

11 Furthermore, the shortcut definition or terms
12 that -- that are included in maliciousness include ill will,
13 and the same acts of misconduct of taking a paycheck from us
14 for months, years, while they stood up this business, while
15 they then leveraged that business in order to take our
16 customers, lying about it, lying to their employers who asked
17 them about it, individuals. I asked Mr. Gajewski: You lied to
18 him? And he didn't flinch. He said, Yes, I did. He was
19 almost proud about it. All of that, all of that that -- that
20 activity, that testimony, the years of conduct, the years
21 of -- of hiding it all show ill will towards KPM, towards their
22 contracts with KPM and their obligations thereto.

23 Under their own case, and certainly under the cases
24 that we've cited with broader definitions of maliciousness, the
25 willful and malicious standard is met on this evidence. We

1 understand the Court's concern in not presenting that to the
2 jury, but it's now on the Court and in your court and ability
3 to decide. And we ask the Court to, based on the evidence that
4 it heard, to make a finding of willful and maliciousness and to
5 double the damages for trade secret misappropriation.

6 Thank you.

7 THE COURT: Thank you.

8 Attorney Ritchie.

9 MR. RITCHIE: The test that has to be met here, your
10 Honor, with respect to willful and malicious is by KPM's
11 admission a discretionary one with this Court. And it frankly
12 requires a moral judgment, which is why I think the Court was
13 right to withhold that from the jury and to consider the issue
14 on its own.

15 The -- there really isn't a dispute about the standard
16 here. I mean this requires and this comes out of the *Contour*
17 *Design* case, ill will, hatred, hostility or evil motive. I
18 don't think -- recognizing that these individual defendants by
19 the jury's judgment have done things wrong, I don't think
20 anyone in this courtroom could have concluded that these
21 individuals acted with ill will, hatred, hostility, or evil
22 motive toward KPM or anyone else.

23 Were they confused about what their legal
24 responsibilities were? They appear to have been.

25 Did they make mistakes with respect to their

1 relationships with customers and relationships with their
2 former employer? Apparently they did.

3 But those mistakes do not rise to the level of
4 evilness or hatred or hostility that's required for a finding
5 of malice here. That's a moral judgment, and your Honor had
6 the opportunity to see the demeanor of these witnesses, to see
7 the character of the evidence, including the cross-examination.
8 The factors relying just on a case and saying, well, this looks
9 like that case or that case doesn't nearly come close enough to
10 take into account the kind of evaluation the Court has to make
11 here.

12 There was no evidence submitted at trial that any of
13 these people were out to hurt KPM. There was no evidence of
14 any kind of animosity towards any individual at KPM. There was
15 no attempt to hurt KPM in the way that, for instance, in the
16 *Resman* case that we cited in our -- in our brief, there was an
17 email that said we're going to destroy the individual and the
18 company that I used to work for. There was none of that.
19 These individuals to some extent -- well, these individuals
20 thought, perhaps mistakenly, that their way of life, their
21 ability to earn their living at KPM was disappearing, and they
22 were looking for other opportunities, but that doesn't rise to
23 hostility or evilness.

24 Now, there are questions about whether or not the
25 witnesses were being honest in their communications. And yes,

1 in fact, the jury concluded, I think, it's at least an
2 inference that some of these communications were not honest.
3 But lack of honesty doesn't mean evilness or hostility.

4 These individuals were caught in embarrassing
5 situations, and they did what is unfortunately too human, but
6 not rising to the left of evilness.

7 I don't really have anything else to say, your Honor.
8 Your Honor has seen the demeanor of these witnesses. Your
9 Honor understands the -- the standards here, the replay. But
10 to argue that these witnesses acted in an evil fashion or in a
11 hostile fashion I think is grossly out of proportion to the
12 evidence. And I think that your Honor had it right when we had
13 the discussion back when we discussed the jury instructions.
14 You said then pure greed, whatever it is, is not the intent to
15 bring about the likelihood of themselves with ill will, hatred,
16 hostility or evil motive. Greed may be evil, but it's not an
17 evil motive. And I would stand by those words and I would
18 encourage the Court to do the same and deny the KPM motion on
19 that point.

20 Thank you.

21 MR. WILSON: No, go ahead.

22 MR. GUTKOSKI: Just one point. KPM is a corporation.
23 The only way to hurt it is to take away its business, its
24 customers, its market, its reason for existence. The fact that
25 they gained from it financially as well, from my view, only

1 makes it worse, but doing so taking those customers, taking
2 those sales and lying about it is ill will because it is the
3 only way to hurt KPM, and it did.

4 THE COURT: All right. I'll just say when -- I agree
5 that greed in and of itself is -- to some people it's the
6 nicest attribute they have in their personal moral character,
7 but greed is not the same as evil, but people -- greed and
8 behavior that derives from it can be evil. So they don't
9 necessarily equal in definition, but they certainly can
10 coexist, and it is the overall behavior of the individuals
11 that -- that must be taken into account.

12 The behavior of the individuals was not just greed.
13 They took something that they knew didn't belong to them. They
14 weren't just -- they weren't just hogging, you know, their
15 sales figures.

16 So their entirety of the -- of the individuals and
17 the -- and the actions of each one of the entities in their
18 behavior is relevant as to whether or not a standard has been
19 met for the 93A.

20 So I will -- you know, what is malicious? I'm no
21 Potter Stewart, but I do think you may find it hard to define
22 it, but I do think you know it when you see it. I will review
23 the filings on that. I've not yet made a determination on
24 that. I do -- I -- I would say that there is no exact case on
25 point. So we will have to take instruction from series of

1 cases from different jurisdictions to determine whether or not
2 the standard has been met. Okay.

3 So that is our Motion No. 2.

4 Let's -- let's go on to the third motion. And for us,
5 that is KPM's motion regarding damages and prejudgment
6 interest.

7 MR. MAGEE: I believe this includes the 93A issues,
8 your Honor.

9 THE COURT: It does, yes.

10 MR. MAGEE: Good morning, your Honor. Scott Magee on
11 behalf of the plaintiff.

12 With respect to the 93A claim, I think all the
13 relevant stakeholders agree that whether the jury in rendering
14 the jury verdict, certainly KPM and even the defendants in
15 their brief agree that the evidence at trial establishes that
16 there was unfair deceptive conduct by Blue Sun and by ITG, and
17 that that conduct was willful or knowing.

18 Nothing in the briefing by the defendants has
19 suggested otherwise. The most that they've done in response is
20 to suggest that ITG's conduct is not so bad that it should
21 warrant treble damages, but they don't dispute -- it's a little
22 interesting in their briefing, but they don't dispute that
23 there's willful or knowing conduct and that mandatory double
24 damages exist at a minimum for that conduct.

25 So I think in terms of what the conduct was, did it

1 fit the standard of willful or knowing, unfair or deceptive
2 conduct. There's no dispute at this point on that, and the
3 Court should find so.

4 The one, I'd say, large defense that the defendants
5 have put forward is this affirmative defense. It is an
6 affirmative defense that they bear the burden of suggesting
7 that there is these -- this conduct was not primarily and
8 substantially in Massachusetts. However, the cases that they
9 rely on, all of the cases that they rely on, point to
10 essentially one conclusion. They say, all those cases hold in
11 one form or another that the mere cite of the loss is
12 insufficient. We don't dispute that, but the SJC decision in
13 *Kuwaiti Danish* that established the center of gravity test, was
14 very clear that there was not a single formulaic test that
15 applies. It is a very fashionably intense inquiry, and when
16 you look at the record here it's not just a question of was
17 there harm in Massachusetts. There absolutely was. In fact,
18 even in *Kuwaiti Danish*, the Court says that the status of the
19 loss is a relevant factor and that KPM is located in
20 Massachusetts and only in Massachusetts. So this -- so that
21 factor lays heavily in favor of finding that this was primarily
22 and substantially in Massachusetts.

23 I would like -- I would also turn your attention, your
24 Honor, to Judge Sorokin's opinion in the -- it's the TLT
25 Construction case. In that case, Judge Sorokin citing First

1 Circuit and SJC precedent spoke about the importance of looking
2 at was the deception directed at Massachusetts. And here the
3 record was replete with deception directed at Massachusetts.
4 It was theft of trade secrets that were maintained in
5 Massachusetts. It was theft of the calibration data sets that
6 Mr. Olson testified to that were maintained in a secure
7 location in Massachusetts that had to be checked out and then,
8 you know, if it was Mr. Gajewski servicing a customer what he
9 was supposed to do is check out the data set he needed for that
10 customer, check it back in in Massachusetts.

11 The instrumentalities of the deception, the emails,
12 the use of KPM's emails by Ms. Glenister forwarding KPM
13 proprietary information to her Gmail account or using the UCal
14 software that originated in and was housed in Massachusetts,
15 that is all deception that was directed at Massachusetts taking
16 away these trade secrets from Massachusetts.

17 Judge Sorokin's opinion in the TLT case again talked
18 about, okay, after that deception happens, what was the
19 response? Was the response to that in Massachusetts? And
20 again, the response to the deception was done in Massachusetts.
21 Mr. Olson again testified about how when they found out about
22 Mr. Gajewski using a -- you know, efforts to sell to other
23 people. They put a tracker on his computer. And that was done
24 from Massachusetts. Mr. Olson was sitting in the Westborough
25 office when he did that. That is another factor that lays

1 heavily in making the center of gravity of this issue in
2 Massachusetts.

3 And even the benefits that the defendants were trying
4 to get for themselves were about taking the goodwill from KPM
5 in Massachusetts. If you look at, for instance, Trial
6 Exhibit 76, these were talking points created by Mr. Lucas, and
7 he said, and in that the talking points are Blue Sun is the
8 original manufacturer of the SpectraStar instruments and has
9 the original engineers and technicians. That's false. Blue
10 Sun was not the original manufacturer of the SpectraStar
11 instruments. Everybody knows that KPM is the manufacturer of
12 the SpectraStar instruments.

13 Mr. Olson testified that all of those instruments are
14 made in Massachusetts, and so this is Blue Sun trying to go out
15 to customers and say we are this company that you know in
16 Massachusetts. We are this KPM company. And, in fact, as your
17 Honor mentioned earlier, there are emails from Disney. There
18 are emails from Lamb Weston that say, Are you part of KPM?
19 There's an email where one of the customers says or Rob
20 Gajewski just says, this is, you know, the same people, just a
21 new sign on the door, suggesting, oh, we're not actually a new
22 company. We're just changing our name. So all of that is
23 directly related to Massachusetts and directly implicates
24 Massachusetts.

25 One of the cases that the defendant cited, the *Skyhook*

1 *versus Google* case, made it -- made it very clear that in that
2 case there was no primarily or substantially connection to
3 Massachusetts, because the wrongdoer, all of the wrongdoers,
4 all of the related companies, Google, Motorola, Samsung are not
5 in Massachusetts. And most importantly, none of the
6 communications, electronic or otherwise, went through
7 Massachusetts.

8 Here all of the emails on KPM's email server, all of
9 the purchase orders, all of the Lamb Weston purchase orders
10 that said Milford, Massachusetts, on it, those all originated
11 in Massachusetts.

12 So when we talk about what the center of gravity of
13 the facts are here, the facts are that this was primarily and
14 substantially done in Massachusetts.

15 The response by the defendants is, well, you know,
16 Mr. Gajewski lived in Illinois; Ms. Glenister in Colorado; and
17 Mr. Lucas, I believe it was California; and Blue Sun is
18 headquartered in Maryland.

19 Well, if you take that argument to its logical
20 conclusion, what the response -- or the defendants are
21 suggesting is that a company could act with impunity under
22 unfair and deceptive trade practice law by just using remote
23 workers around the country. And in this world where there are
24 a lot more workers who are working remotely, that becomes an
25 even bigger problem. So this should not be an opportunity for

1 a defendant that everybody agrees has destroyed employment
2 relationships between Massachusetts employees and their
3 company, that has taken trade secrets from Massachusetts, this
4 should not be an opportunity for the defendants to create case
5 law but skirts a remedy for -- for a party that's harmed by
6 this.

7 The next point that -- of contention in the brief is a
8 question of whether or not the violation of the preliminary
9 injunction that Mr. Gutkoski spoke about earlier is something
10 that would constitute unfair and deceptive trade practices act.
11 The defendant's response primarily is, well, the only case
12 they've cited suggesting that violation of an injunction can be
13 a 93A violation is a Rule 128 decision from the Appeals Court
14 in Massachusetts. We don't give those much weight and cite
15 that it's only one case.

16 Well, they never cited a contrary case; and in
17 preparing for the hearing, I did identify an additional case
18 which actually is particularly notable. It was a case that
19 went to the Massachusetts Appeals Court twice, and I have
20 copies with me, and I'm happy to hand them up and distribute
21 them. And what happened in 2007, there was a case where a
22 person was intending to buy a condo. The Board of Trustees
23 said, okay, we'll enter a new agreement, buy the condo, and
24 then they backed out of that agreement, and they leased it to
25 someone else. They got wrecked, the trustees did. And there

1 was a bench trial in which the -- well, and then the Court had
2 entered -- and that was in violation of an injunction. There
3 had been an injunction, a preliminary injunction saying that
4 the trustees cannot rent this out. They need to sell the condo
5 unit to this individual. Nevertheless, they violated the
6 injunction twice just like the defendants here.

7 After trial, the judge did not make a determination
8 about whether or not there was a violation of 93A. The Appeals
9 Court remanded and sent it back and -- and said you need to try
10 this issue.

11 On a retrial, the judge, the trial judge concluded,
12 yes, the violation of the -- of preliminary injunction by the
13 trustees was a violation of 93A, and the award of damages
14 disgorging all of the rents and providing those to the
15 plaintiff.

16 On appeal, the Appeals Court not only affirmed that
17 that was a violation of 93A, but also affirmed that that
18 disgorgement was the proper remedy, that that was the proper
19 measure of damages, even if it was going to make the plaintiff
20 more whole because it wasn't based on lost profits or some
21 actual loss, which brings us to the next point, which is here
22 that is exactly what we are asking this court to do with
23 respect to damages.

24 The defendants have suggested that we are not
25 calculating damages properly because we have not established

1 actual loss, but, in fact, the statute as we've set forth in
2 our briefing allows for equitable relief as part of the 93A
3 damages. That would include unjust enrichment. That's exactly
4 what happened in the *Chamberlain* case.

5 Also that's exactly what happened earlier this year in
6 Judge Stearns' decision in the *BioPoint* case, which was the
7 trade secret case that is very similar to this case.

8 So in calculating the damages here, the proper measure
9 of damages is, in fact, what the jury concluded was the measure
10 of damages for the tortious interference and the trade secret
11 misappropriation, \$1.5 million against Blue Sun, \$1.8 million
12 against ITG; and then on top of that what the jury didn't hear,
13 the additional damages from the violation of the injunction and
14 the calculations we've set forth in our brief from trial
15 Exhibits 474 and 475 for the sales of the Idahoan and R&R
16 machines after the injunction was ordered.

17 Ms. Zacharakis will be able to walk you through the
18 map a little bit later as we wrap up.

19 So in terms of what the damages ought to be, the
20 damages, to be clear, and I hope we were clear about this in
21 our briefing, we are not trying to stack \$1.5 million and 93A
22 damages on top of \$1.5 million for trade secret damages. What
23 we are trying to do is say there's \$1.5 million for trade
24 secret damages against Blue Sun. That is the same quantum of
25 harm that KPM suffered in the 93A context so we aren't going to

1 recover both of those cumulatively, but that \$1.5 million
2 should be subject to trebling.

3 And then the final point on the damage calculation is
4 that ITG is and should be responsible for the damages that Blue
5 Sun is liable for under 93A. That is for two separate reasons,
6 either one of which is a legitimate basis for finding that ITG
7 is responsible.

8 First is that the evidence at trial established that
9 Blue Sun was the sales arm of ITG. It was the agent of ITG.
10 Under the -- and under the *BioPoint* case, which was citing the
11 SJC case in *Consolis*, vicarious liability attaches. That's
12 why, as we tried to hopefully set forth in the calculations in
13 our filings, ITG is responsible for Blue Sun's portion of the
14 damages jointly and severally in addition to its own, but Blue
15 Sun as the agent is not jointly and severally liable for ITG's
16 1.8 million. And that's where the distinction comes from.

17 And, finally, I don't want to belabor it because I
18 think we detail it in, you know, pretty seriously in our brief,
19 but the litany of facts, even if there was no vicarious
20 liability that attaches in the 93A context, despite the SJC's
21 saying it does, we'd still be able to pierce the veil, that ITG
22 was engaged in confused intermingling, created Blue Sun in
23 order to perpetrate the wrongdoing that the jury found that it
24 did do.

25 And so that, your Honor, is why we request that you

1 enter a judgment in our favor, 93A damages against both Blue
2 Sun and ITG trebled, and that trebling includes the damages for
3 the violation of the preliminary injunction.

4 THE COURT: Can I ask --

5 MR. MAGEE: Yes.

6 THE COURT: -- just if you could -- I have a bit of
7 more experience on the state court with 93A claims. I did
8 numerous of them. It's preliminarily a consumer protection
9 statute.

10 So how does that -- how does that protect -- I mean,
11 we don't -- right now we're dealing with the players.

12 MR. MAGEE: Right.

13 THE COURT: And this is not an individual, and it's
14 generally the background is that, you know, if one person
15 sues the -- has to sue their insurance company because they
16 can't -- you know, prematurely canceled their policy and then
17 they, you know -- and it turns out that this is a pattern and
18 practice of a company against individuals, and so there's some
19 consumer protection there. Sort of equal players here, if you
20 will, I mean certainly they're in the same -- they're both in
21 the same business. So what is the -- how is the purpose of 93A
22 served by recognition in this case?

23 MR. MAGEE: That's why the legislature adopted
24 Section 11. Section 9 of Chapter 93A protects the consumers.
25 Section 11 protects the business-to-business interactions

1 between two companies such as KPM and Blue Sun or KPM and ITG.

2 And so the legislature has said, this is not merely
3 about consumer protection. This is about protection of
4 business people, who are expected to see honesty within the
5 market; and, in fact, if you look at some of the cases that we
6 cited in our Judge Gants case on the CVS case or Judge
7 Hennessy's case that was a recommendation and -- report and
8 recommendation that was adopted by Judge Hillman. In both of
9 those cases, the -- they were decided under Section 9, but
10 there's no reason it should not also apply under Section 11,
11 that the deterrent fact of having these punitive damages,
12 having the multiple damages on the full amount of damages that
13 does not permit a defendant who engages in the bad conduct the
14 willful and knowing unfair and deceptive conduct, that
15 deterrent effect is what the statute is designed to do. And
16 that's one more reason why the full amount of damages, whether
17 it's based on lost profits or whether it's characterized as
18 unjust enrichment, neither of which the jury specifically
19 delineated, that's why the entire amount should be trebled,
20 because otherwise --

21 THE COURT: There -- but there is also an element of
22 93A which provides for a remedy when there is an inadequate
23 remedy. Sometimes the harm is \$15,000, right, and that does
24 not adequately undo the harm that was perpetrated on an
25 individual or maybe even a company.

1 So there -- yeah, I understand that, but it is still
2 primarily intended to be a -- it is an unusual award
3 that's -- and it -- it should be for the most egregious of
4 cases and so -- and I mean that's why the treble damages, which
5 is an incredible amount of damage assessment is allowed, but
6 it's also -- it's not intended to be your everyday remedy. It
7 really must be confined to those circumstances where it
8 is -- and I'm not suggesting this isn't one of those or it is.
9 I'm just saying there is a history to 93A that is different
10 than regular jury verdicts, which are based on particular facts
11 on particular circumstances.

12 MR. MAGEE: Right, and in response to that, your
13 Honor, I would say the facts in this case of copying a thumb
14 drive, of using false emails, of lying to customers, of lying
15 to Bob Schumann about whether or not Arnold Eilert had ever
16 heard of Blue Sun when he clearly had for months, that is all
17 conduct that is much more egregious than the conduct in the
18 *BioPoint* case where Judge Stearns easily trebled the damages.

19 THE COURT: Well, I know Judge Stearns. And I'm not
20 saying I know how I'll rule, but I fully respect Judge Stearns,
21 and I appreciate that.

22 MR. MAGEE: Right. And my point, your Honor, is that
23 this is one of those exceptional cases.

24 THE COURT: Thank you.

25 MR. MAGEE: And even if it's not trebled, double

1 damages are mandatory.

2 THE COURT: Thank you very much.

3 Attorney Ritchie.

4 MR. RITCHIE: Thank you, your Honor.

5 I want to be clear about what the jury did award in
6 this case. They gave KPM everything that KPM asked for. KPM
7 asked for in total about \$3.4 million, and I think the math
8 adds up. It came out a little bit skewed, as I'll talk about
9 in a separate motion, but I think the award was in the range of
10 \$3.3 million. And it wasn't just the amount of money that KPM
11 was awarded. It was the kind of money that KPM was awarded by
12 the jury. KPM did not ask the jury to give it, at least not as
13 a primary means of compensation, its lost profits in this case.
14 KPM asked the jury to go back into Blue Sun and ITG and
15 disgorge every profit of every sale that had been made by ITG
16 or Blue Sun since Blue Sun's formation up to the date of trial.
17 And I referenced earlier Exhibits 147 and 148 because I think
18 they're important here.

19 I'm not -- I'm not suggesting the Court change the
20 jury's award, but when looking at the context of the treble
21 damages, the extra relief that KPM wants under 93A, it's simply
22 not warranted.

23 KPM -- the jury gave KPM the value of every sale that
24 ITG or Blue Sun made regardless of whether that customer had a
25 KPM machine at the time of sale, regardless of whether ITG had

1 previously sold to that customer or whether Unity Scientific
2 going back to the days before KPM had sold to that particular
3 customer. They made no distinction there at all. We asked
4 them to do that, and it was obviously the jury's decision not
5 to do that. It is what it is, but KPM got every dollar and
6 cent that it asked for at this trial.

7 Now KPM comes in and says it's not enough. We want
8 the Court to treble damages, and the math is astounding. Not
9 my strong point, but it's astounding, six point -- \$16 million
10 in damages KPM wants. I submit that this is the equivalent of
11 trying to crush a fly with a hammer, your Honor. 93A is
12 definitely a hammer. It's not a statute that exists in many
13 other jurisdictions in which I've had cases. Certainly not in
14 my home state and in other states that I've had cases in. And
15 it's an incredibly powerful tool, which means it has to be used
16 with discretion and only when clearly warranted.

17 The measure of damages to be clear under 93A is not
18 unjust enrichment, which is what KPM got; it's lost profits.
19 The jury went beyond lost profits and awarded KPM all of the
20 money that Blue Sun and ITG had made since Blue Sun was formed.
21 So even within that award there's an extra amount of money that
22 wouldn't account for the 93A damages. 93A damages would have
23 been about \$900,000 or so against Blue Sun, and the jury
24 awarded 1.5 million.

25 There -- this is not that kind of a case, and the jury

1 went out of its way to give KPM everything that it warranted.

2 We're not conceding anything here, but I want to talk
3 a little bit about ITG, because again this statute, as I
4 understand it, requires that the actions by a defendant to be
5 found liable have to be intentional and callous. And your
6 Honor will well remember the -- the -- and I apologize, there
7 were so many discussions about it, but we had many discussions
8 about the willful blindness instruction that your Honor
9 ultimately gave. And I believe the jury took that instruction
10 to heart with respect to ITG. I believe, and your Honor has
11 already alluded to it today, that the jury concluded that
12 Mr. Wilt, as in KPM's words, buried his head in the sand,
13 didn't wanted to hear about it, maybe he dropped a match near
14 the fire and he walked away. Whatever the analogy is. But
15 that's not intentional and callous. That's something
16 different, because if it weren't -- if it wasn't -- if willful
17 blindness wasn't an issue in this case, your Honor wouldn't
18 have given the instruction and KPM wouldn't have asked for it.

19 And again, as I did before, I go back to the jury's
20 finding with respect to the trade secret issue. I understand
21 your Honor's prior comments with respect to the injunction, but
22 I submit that that finding is significant and has some meaning
23 in the context of this overall case. If the jury thought for
24 certain that ITG had taken the trade secrets and used them
25 intentionally and callously to hurt KPM, we would be in a

1 different situation with respect to 93A, but the jury rejected
2 that. And I think when you look at that rejection, combined
3 with the willful blindness instruction, the conclusion has to
4 be that the jury didn't like the idea that Mr. Wilt buried his
5 head in the sand. Okay. They punished him for it. They
6 punished ITG for it. That doesn't rise to the level of 93A
7 culpability. I think I've said enough on that.

8 There is an issue, a substantial issue here, your
9 Honor, and I'm going to give it some weight with respect to
10 whether the acts that give rise to plaintiff's claims actually
11 occurred within the Commonwealth of Massachusetts.

12 Clearly, the harm was felt in Massachusetts, I'm not
13 disputing that. There has been ample testimony, but when one
14 looks at the -- the quantum of facts here, what do you have?
15 You have my clients located in Maryland. You have the
16 defendants scattered all across the United States, and you have
17 the customers scattered all across the United States as well.
18 This case was fundamentally about my clients or the individual
19 defendants taking KPM data, KPM trade secrets, and selling
20 machines that were not made, by the way, in Massachusetts.
21 They're made in Maryland. My client's machines are made in
22 Maryland to customers not located within the Commonwealth.

23 The reason that I mention that other states don't have
24 the statute is because it is an extraordinarily powerful tool,
25 and it's clearly designed, and the intention, obviously, of the

1 legislature was to govern actions, fundamentally actions within
2 the Commonwealth, not across all 50 states of the United
3 States, and the cases we --

4 THE COURT: I just want to -- I just want to interrupt
5 you here.

6 MR. RITCHIE: Yeah.

7 THE COURT: One of the -- one of the main reasons
8 behind 93A --

9 MR. RITCHIE: I'm sorry, your Honor.

10 THE COURT: One of the main reasons the legislation
11 even came up is when predatory companies would prey on
12 Massachusetts citizens and then they would say you have to sue
13 us in Ohio or South Dakota or the Bahamas -- and especially
14 credit card companies. And the amount of harm on consumers in
15 Massachusetts, who were either trapped, they had to take their
16 loss because there was no action that could fully compensate
17 them. There was so -- there was -- that was a very -- and I
18 will agree with you that if there's a law in only one state
19 it's probably going to be in Massachusetts.

20 MR. RITCHIE: Or New Jersey.

21 THE COURT: Or New Jersey. But the -- the -- the
22 reasoning behind it is not that -- in fact, the reasoning
23 behind it is that a corporation can't hide. If it's going to
24 do business in Massachusetts, it takes on the responsibility of
25 knowing that there is this thing that will govern a

1 person's -- an individual's claim.

2 They were incorporated or paid -- or were recognized
3 by the Commonwealth of Massachusetts as having a headquarters
4 here, and that's enough. It's enough. It's -- what we know
5 now is our world is completely connected in ways and not really
6 by geography, but the requirement or the locus of a preliminary
7 part of this was the base of operations of the plaintiff and
8 where it took place, whether or not it was through, you know,
9 off-site working or -- or through businesses that weren't
10 located in Massachusetts, that's not really the issue, because
11 that really is why the statutes exists. It's to provide
12 someone who has a leg in this Commonwealth that has an ability
13 to seek a remedy and -- but I think what's more problematic for
14 the entire 93A claim is because there is, you know, it
15 is -- it's not like what is evil. It's really -- it's -- it's
16 intended to provide a remedy where there is no remedy. So if
17 the -- like I said, if the loss is 15,000, it could bankrupt a
18 particular consumer. So the -- if the behavior was so
19 egregious by the corporation, they should -- that's what the
20 Commonwealth has said. You should -- you should make -- you're
21 going -- you're going to pay more because your harm had a
22 greater impact on this individual.

23 But if all of the other remedies in this -- we have a
24 lot of numbers here, and math is not my forte either. We have
25 a lot of numbers here, and all of these numbers should add up

1 to real harm, and then a statement about the harm, but it
2 shouldn't be that the numbers are so big that they have no
3 connection to reasonableness, and I -- it's my hope that
4 whatever math we do I'm assisted with people who actually can
5 use the calculators or actually do it better than me, but what
6 we come to is an amount that -- that pays homage to that. The
7 harm itself and some measure of making a statement, if the jury
8 has indicated that something should be said, but it shouldn't
9 be so great as to -- as to not have any connection to reality.
10 And we're not talking about Davey versus Goliaths here. We're
11 talking about, you know, pretty equal people between
12 Wilts -- oh, no, oh, no, ITG --

13 MR. RITCHIE: Well, I'm going to disagree with you
14 there.

15 THE COURT: Well, listen, if Mr. Wilts had not thrown
16 a petal in a pond, there would have been no ripples. None.
17 This would not even be an issue. So we're talking about
18 people, who are at least intellectually and business wise of
19 the same ilk. We're not just talking about one little person
20 here, so. But I want to assure you all the numbers mean
21 something to me, and they have to be rooted in a reasonable
22 reading of the law and the intent of the law. And they are not
23 intended to label anyone bad or deserving of retribution
24 through some type of an award. The award is going to be based
25 in reality, and I -- I recognize the arguments that you made.

1 I do, all parties. And I just want to be sure you all
2 understand that.

3 MR. RITCHIE: Let me then conclude, your Honor,
4 otherwise, we'd submit on the briefs on that, but to conclude
5 with this statement, which is that I appreciate your Honor's
6 comments about based on reality. I think they have to be
7 proportional too.

8 I understand your comment about, you know, the
9 intellectual capacities of Mr. Wilt and the individuals at KPM,
10 but it is David and Goliath when it comes to business sides.
11 And we have -- you know, we've given your Honor, I don't know,
12 the last five, six years of net profits. This is a company
13 that, you know, can hardly make \$50,000 annual a year. So the
14 kinds of damages that KPM, whether it's under the 93A, whether
15 it's under trade secrets, whether it's under the attorneys'
16 fees that they're asking, this is -- this will end these
17 companies, I mean; and quite frankly and candidly, I know your
18 Honor may not agree. I think that's the intention here. We've
19 gone beyond punishment. We've gone beyond recompense for KPM.
20 We have moved into something, in my view, very much darker,
21 which is the extinction of my clients. And so I hope that your
22 Honor, when you do reach the numbers, that your Honor will take
23 that into account.

24 Thank you.

25 THE COURT: I certainly expect to, and I would be held

1 to that standard.

2 MR. RITCHIE: Thank you.

3 THE COURT: All right.

4 MR. MAGEE: Your Honor, if I may, one thing. I can
5 just do it from here.

6 THE COURT: All right.

7 MR. MAGEE: I think Mr. Ritchie is conflating
8 willfulness and knowing under the statute.

9 It's a disjunctive test under 93A. So we don't need
10 to show that Mr. Wilt was acting knowingly if we can show that
11 he was acting willfully. And the Supreme Judicial Court has
12 already covered this in the *Kattar versus Demoulas* case saying
13 we have said that a finding of willful conduct within the
14 meaning of 93A is satisfied where the defendant has acted
15 recklessly.

16 So all the evidence of Mr. Wilt, you know, starting
17 this chain in motion and saying, no, don't -- I don't want to
18 see what's over there, that's not sufficient to insulate him
19 from a knowing and willful finding consistent with what the
20 jury found.

21 THE COURT: All right. Thank you very much.

22 That is our third and -- we didn't raise it, because
23 no one argued it except in the papers, but as far as
24 prejudgment interest, I -- I will use the same guide on
25 prejudgment interest. I'm -- I'm going to -- I'm going to read

1 through. I haven't fully read through all of the arguments
2 with the specificity I'm going to now, because after these
3 arguments and then so I just want you to be aware that I'm
4 really -- I haven't made a determination on that. I understand
5 your arguments on both sides, and I will take those into
6 account. All right.

7 Okay. We have KPM's motion for attorney fees and
8 costs.

9 All right, counsel.

10 MR. MOSIER: Good afternoon, your Honor. Kevin Mosier
11 for KPM.

12 So I think, first, it's important to note that KPM is
13 entitled to fees under three separate hooks, if you will.

14 The first is Chapter 93A, which is a mandatory fee
15 provision. Under Chapter 93A, KPM is entitled to its fees as
16 a -- fees and costs -- excuse me -- as a matter of right.

17 The second is contractual provisions with the
18 individual defendants which we've heard about. These are in
19 evidence. The contractual provisions themselves are clear.
20 They're unambiguous. They have never at any point in this
21 litigation been challenged as -- as unenforceable or invalid.
22 And those provisions themselves are also mandatory. They say
23 KPM shall be entitled to recover from you, meaning the
24 defendants, its reasonable costs and fees in the action. And
25 the Supreme Judicial Court in Massachusetts has made clear that

1 when such a clear, unambiguous, valid, enforceable contractual
2 provision exists an award of fees is appropriate in that
3 instance. Those are two mandatory fee provisions.

4 There's a third hock, which is under the uniform
5 defend trade secrets or -- excuse me, the Defend Trade Secrets
6 Act, the Massachusetts Uniform Trade Secrets Act. Those are
7 discretionary, and we're going to focus our argument, as we
8 focused our brief, which is on the mandatory fee provisions.

9 So KPM is asking for -- I'm going to give the exact
10 numbers, and then I'll use a shorthand. KPM is asking for
11 \$3,799,531 in attorneys' fees. I'm just going to say 3.8 for
12 convenience. And \$339,409.45 in costs, I'll say 340,000 for
13 convenience, for a total of just over 4.1 million. This amount
14 is reasonable when you compare that with similar trade secret
15 cases to this one.

16 We've cited a number of cases in our briefing for your
17 Honor. One of those is *Specialized Technology Resources*. This
18 case involved one trade secret litigated by three law firms.
19 There was over \$5 million in fees and costs awarded in that
20 case where damages themselves were just over 1 million, later
21 trebled to 3 million.

22 The most recent case in this jurisdiction was
23 *BioPoint*, which we've heard about today, Judge Stearns'
24 decision. *BioPoint* involved trade secrets that were limited to
25 customer and client information, which is similar to one of the

1 three trade secrets here. There weren't technical trade
2 secrets in that case, such as the calibration data sets or UCal
3 software at issue here. In that case Judge Stearns awarded
4 \$2.5 million in fees and costs.

5 There's also the *Contour Design* case we've heard
6 about. That case was a six-day trial in the District of New
7 Hampshire, just over half the length of this trial, 1.5 million
8 in fees and costs.

9 More recently or -- excuse me -- actually, yes, more
10 recently the benchmark case litigated in Massachusetts that was
11 limited to one trade secret at trial. There was limited
12 discovery, only five depositions taken in that case. Most of
13 the case was decided on summary judgment; \$1 million in fees
14 and costs in that case.

15 As we laid out our motion this is a complex case
16 involving numerous trade secrets and involving numerous
17 defendants at trial. The parties were able to simplify the
18 technology and the trade secrets at trial for the jury. That
19 doesn't mean that we didn't need to invest the time to
20 understand the trade secrets, to understand the facts, to
21 litigate the legal issues, and to be able to present those
22 facts and those issues in a way that a jury could understand.

23 There's a lot of motion practice required in this
24 case, as we laid out in our brief. This is true of all stages
25 of the case, both pretrial and during trial. There is motion

1 practice necessary to obtain the preliminary injunction, to
2 defend the preliminary injunction, to oppose motions to dismiss
3 that were filed separately by each individual defendant,
4 including the entity defendants. I know individual defendants
5 has become a term of art in this case.

6 And there is also summary judgment, of course. In
7 total there were 13 pretrial motions filed by just the
8 defendants alone. Those included eight separate motions to
9 dismiss, as I just mentioned, two motions for clarification of
10 the preliminary injunction, an unsuccessful motion to dissolve
11 and modify the preliminary injunction, a frivolous and
12 unsuccessful motion to compel, and an unsuccessful motion of
13 summary judgment.

14 Discovery in this case was also a major effort. There
15 were 21 total depositions taken, tens of thousands of documents
16 reviewed, and those documents were important in this case,
17 because as you saw the evidence of the wrongdoing was largely
18 from these documents that our team had to review.

19 And, as we know, KPM's discovery efforts were
20 obstructed by the spoliation of evidence, which we've talked
21 about here today, and I won't belabor it at oral argument. The
22 trial itself proceeded over the course of ten days, including
23 nine live witnesses, which is a longer trial and more witnesses
24 than any of the cases I just mentioned.

25 It's important to note the defendants have not

1 challenged the reasonableness of the rates charged by KPM's
2 attorneys, nor have they challenged any particular category of
3 costs sought.

4 As one of the important considerations when assessing
5 the reasonableness of fees is the result obtained, and you just
6 heard counsel for defendants say not too long ago the jury gave
7 KPM everything it asked for. KPM achieved a near complete
8 victory in its claims. In view of the amount of time, effort
9 to litigate this case, the reasonable rates charged, the result
10 obtained, this is a reasonable amount of fees comparable to
11 other cases in this district.

12 And, you know, I just heard Mr. Ritchie talk about,
13 you know, the purpose as to -- I forget what word he used and
14 this company, various company. That's not the purpose. The
15 fees are the fees. And also fairness to the defendant is just
16 quite simply not one of the considerations here. The
17 consideration overall is the fair market value of the services
18 provided.

19 So the defendants are going ask this Court to do one
20 thing it cannot do and many things it should not do, and we
21 know this because they asked it in their briefing. The thing
22 they're going to ask the Court to do, which it cannot do is
23 deny KPM's requests for fees and costs in their entirety. KPM
24 has an unqualified right to recover its fees under 93A and
25 under the plain terms of the employment contracts of the

1 defendant.

2 The statutory language of 93A and the case law
3 interpreting it is clear that awarding fees and costs is not
4 discretionary. What is discretionary is what amount is
5 reasonable. That's the Court's discretion here. The same goes
6 for attorney -- for the contractual provisions.

7 So I'd like to point out the cases that the defendants
8 cited in support of their argument for a complete or near total
9 reduction in fees and costs.

10 They cite the *Norkunas* case. That's an ADA
11 case -- it's an ADA case decided under 42 U.S.C. 12205. That's
12 a discretionary fee provision, not mandatory.

13 They cite *Grendel's Den* and *Culebras* a lot. They cite
14 *Grendel's Den* as this case that says in egregious cases you can
15 deny fees altogether. *Grendel's Den* and *Culebras* are again
16 discretionary fee provision cases under 1988, not mandatory fee
17 provision cases.

18 Importantly, in *Grendel's Den*, the Court still awarded
19 fees and costs despite what they call a complete absence of
20 contemporaneous time records. So even in the case defendants
21 cite for the proposition that this Court can deny fees in its
22 entirety, that Court did not deny fees in their entirety, and
23 they were deciding those fees under a discretionary statute not
24 a mandatory one.

25 They also cite *DataTern*. That's an exceptional case,

1 standard case. Anyone who litigates maybe patents would
2 understand that the exceptional case standard is a very high
3 bar for fees.

4 They only cite three cases decided under a mandatory
5 fee provision: *Gardner*, *Pizzo*, and *Full Spectrum*.

6 *Gardner*, again awarded fees despite no time records at
7 all.

8 *Pizzo* applied a 33 percent reduction for excessive
9 redaction, not a full rejection, and they prevent -- they
10 present *Full Spectrum* as an example of a complete denial. They
11 say courts have denied fees in their entirety, here's an entire
12 paragraph on *Full Spectrum*, which was the Judge Hillman
13 decision.

14 In *Full Spectrum*, Judge Hillman still awarded
15 50 percent of the fees and costs requested, despite heavily
16 redacted invoices and other inefficiencies.

17 The defendants have cited no case where a court has
18 denied fees and costs in their entirety under Chapter 93A or a
19 valid contractual fee shifting provision.

20 So the consequence of KPM failing to meet its burden
21 to prove that the \$4.1 million request is reasonable is not a
22 full denial. And their own cases make this clear. In fact,
23 *Full Spectrum* says they did not meet their burden but still
24 awarded fees. The consequence, if KPM hasn't met its burden,
25 is just a lesser amount than what KPM has asked for, not zero

1 and not any amount lesser than the fair value of the work that
2 was performed.

3 The defendants are also going to ask this Court to
4 separate out and deny fees for claims that were unsuccessful.
5 The case law is clear that this Court should not do that.

6 We've cited to you a number of cases both from the
7 First Circuit and from the Mass Supreme Judicial Court that
8 talks about when all of the claims are intertwined
9 or -- and/or, the same thing here, when all the claims are
10 intertwined or the same legal effort is required to litigate
11 and prove those claims, there's no need to separate out
12 successful and unsuccessful claims under 93A, because the
13 effort required was the same either way.

14 And this is true with ITG. You know, they want to
15 separate out money spent litigating the trade secret claims
16 against ITG, but to litigate the tortious interference claims
17 against ITG, KPM still had to litigate the misuse and
18 misappropriation of trade secrets and confidential information
19 with regard to the individual defendants. There's no
20 meaningful difference in legal effort that was expended.

21 One case in particular, I think has pretty strong
22 language. It's *Brogan versus City of Boston* from the First
23 Circuit, and it says, In these instances where the legal effort
24 required was the same regardless of which particular claims are
25 brought and which particular claims are successful, that court

1 says, quote, any rationale for discounting hours spent on
2 unsuccessful claims does not apply.

3 The same is true in *Haddad Motor Group*. The same is
4 true in the *Twin Fires* case, and these are just some I picked
5 out in this authority's legion here.

6 Defendants are also going to ask for global reduction
7 for allegedly vague time entries or block billing. That's not
8 warranted here. The invoices KPM submitted were kept
9 contemporaneously. They provide sufficient evidence of the
10 task performed and the number of hours expended. Most of KPM's
11 entries are not block billing entries, because they contain
12 either only one task or a sufficient narrative description to
13 understand what work was performed in those entries.

14 In any event, the Supreme Court of Massachusetts has
15 made it clear that the Court is to consider the request as a
16 whole. It's not to parse out individual entries. That
17 approach is more of what's known as the lodestar approach, and
18 it's clear from case law that the lodestar approach is, quote,
19 disfavored under the holistic approach that is favored in these
20 instances.

21 So defendants cite *Benchmark*, both as justification
22 for parsing out unsuccessful claims and for a global reduction
23 of block billing. In *Benchmark* there is a 50 percent global
24 reduction for a number of things. It wasn't just one or the
25 other. But it's important to know that the 50 percent

1 reduction included work spent on claims that the Court found
2 were wholly unrelated. There are no wholly unrelated claims
3 here.

4 And it's also interesting in the cases cited by the
5 defendants, including the *Volkswagen* and *Audi* case, those cases
6 state that the typical global reduction for block billing, if
7 there is one at all, is in the ballpark of 15 to 20 percent,
8 not 50 percent, and not a complete denial.

9 They also ask this Court to apportion fees on a
10 defendant-by-defendant basis. We have mentioned why we believe
11 that each defendant should be jointly and severally liable.
12 And we don't believe that regardless, separating out fees on a
13 defendant-by-defendant basis makes sense here, given how wholly
14 interrelated the claims are, given how all of the defendants be
15 them individual defendants or the entity defendants, how all of
16 their actions come together to form the big picture simply
17 would not make sense to do that. It's certainly not required
18 to do that. I don't believe defendants cited in their briefing
19 any case that did that. Perhaps they did. I don't recall.
20 It's certainly not required.

21 Reasonable attorneys' fees can greatly exceed the
22 amount of actual damages. Earlier we talked about a case where
23 there was \$5 million in fees on a \$1 million jury verdict. And
24 in fact, under 93A, attorneys' fees can be awarded -- I mean
25 fees and costs -- when I say attorneys' fees, I'm using a

1 shorthand. Under 93A attorneys' fees and costs can be awarded
2 despite no damages at all against anyone, and that's what
3 happened in the *Benchmark* case. There were no damages. There
4 was still a \$1 million award of fees and costs.

5 The individual defendants signed contracts knowingly
6 and voluntarily that qualified an absolute right for KPM
7 to -- for KPM to recover its reasonable fees as a matter of
8 right. Nothing in that contract provided that recovery would
9 be based on liability, apportionment, right, apportionment
10 based on liability. You could draft a contract that does that.
11 This contract was not that. It was not qualified in such a way
12 that says, well, KPM can recover its reasonable fees, but we
13 need to figure out how to apportion that between defendant
14 based on wrongdoing. That's not what the fee provision says.

15 And again, the defendants have not pointed to any case
16 that would require this Court to do that.

17 And as I mentioned before, fairness is not one of the
18 considerations here. Here is what the Court does consider. It
19 considers the nature of the case and issues presented, it's a
20 complex case with many issues presented; the time and labor
21 required to litigate the case; the amount of damages involved;
22 the result obtained; the experience and ability of the
23 attorneys; the usual price charged for similar services in the
24 same practice area; and the amount of fees and costs awarded in
25 similar cases.

1 It does not include this metric of what is fair. The
2 overall question is what is the fair market value of the
3 services provided by KPM's counsel. And we submit to you that
4 the fair market value is \$4.1 million in total, and that's
5 broken up across fees and costs.

6 I think I will rest there and field any questions your
7 Honor may have and reserve some time to respond to whatever we
8 hear from the defendants.

9 THE COURT: Thank you very much.

10 MR. MOSIER: Thank you, your Honor.

11 THE COURT: Attorney Wilson.

12 MR. WILSON: Your Honor, while fairness may not be one
13 of the factors, certainly your Honor has the, I would say in
14 this case, unfortunate obligation to determine what is
15 reasonable. And we would submit that the manner in which KPM
16 has submitted their attorneys' fees and costs has rendered it
17 impossible, certainly for the defendants, and I would suggest
18 for your Honor as well to make that determination.

19 The redactions to these invoices, I'm sure you've seen
20 plenty over your career. I've seen a few. I think of this as
21 outrageous. I've never seen anything close to this level of
22 redactions. Clearly, information was redacted from these
23 invoices that did not include any kind of privileged
24 communications. Who somebody talked to is not privileged.
25 What document somebody may have worked on is not privileged.

1 And in the *Grendel's Den* case, the First Circuit did
2 say that in egregious cases the Court does have the discretion
3 to disallow attorneys' fees. And obviously, that's going to be
4 at your Honor's discretion. And we think this, based on these
5 redactions, it's certainly an egregious -- an egregious case.

6 And, frankly, the fact that KPM then came back on
7 reply brief and said, oops, we want a do-over, here's some less
8 redacted invoices, I think the Court should not consider those.
9 Obviously, a reply brief should be limited to things that you
10 couldn't possibly anticipate the other side would raise; and
11 frankly, we spent quite a bit of time and money going through
12 those invoices and now to have -- to be required to do it a
13 second time because they chose to present their fees in a way
14 that rendered it impossible shouldn't fall on us. And so I
15 would ask that your Honor not to consider the second set of
16 invoices that were submitted.

17 Very briefly on the remaining issues, I believe
18 Attorney Mosier said that these invoices don't include block
19 billing. Every single -- every single entry almost in these
20 bills includes block billing. Plenty of them were completely
21 vague. "Attention to" and then two or three words that are
22 redacted. I don't know what those words were because they were
23 redacted, but it couldn't have possibly have included enough
24 detail for your Honor to determine whether the amount spent was
25 reasonable.

1 If -- if KPM is okay with its lawyers, you know,
2 providing those types of invoices, that's between them, but if
3 they're going to come to court and ask the defendants to pay
4 the bill, they need to provide more detail.

5 There were unsuccessful claims that they're seeking
6 their fees on. Three of the defendants were dismissed from the
7 case. I will concede it's a smaller portion of the overall
8 amount. So I'm not going to belabor the point.

9 And then there was quite a bit of duplicative work.
10 You know, multiple law firms have been shuffled in and out of
11 the case on KPM's side. Again, certainly they're -- it's up to
12 them how they want to, you know, who they want to hire, how
13 many lawyers they want to staff on the case. But ultimately it
14 comes down to whether the total amount was reasonable. And we
15 think those -- these invoices, to the extent you can decipher
16 them, evidenced quite a bit of duplicative work.

17 There was also a lot of work performed by attorneys on
18 noncore tasks. And certainly, I want to make sure as an
19 associate at a large law firm, nobody's a bigger champion than
20 I am for younger attorneys getting the opportunities,
21 especially in trial, to come and do things. So I certainly
22 don't want anything we wrote to be seen as disparaging either
23 Attorney Zacharakis or Mosier. I think the issue is though, if
24 they want to bring multiple lawyers to hearings, they want to
25 bring multiple lawyers to depositions or trials, I think that's

1 great. I don't think that they can then have the defendants
2 pay the bill on that.

3 And -- and the last point that I think is important is
4 this issue of apportionment. The individual defendants, the
5 percentage of harm that the jury found that they caused overall
6 was a fraction of a percent. Mr. Eilert, I think, was
7 .1 percent. I think Mr. Lucas was the highest at .8 percent.
8 And, your Honor, under the *Torres Rivera* case of the First
9 Circuit has discretion to weigh equitable factors in terms of
10 deciding how to apportion any fee amount.

11 And one of the things that the Court can consider is
12 the defendants ability to pay. Your Honor heard evidence
13 during trial that these individual defendants make modest
14 salaries at -- at Blue Sun. And, frankly, I think, you know,
15 we've talked a lot about today about sort of honoring the
16 jury's decision. And I think, you know, I think what can be
17 inferred from the jury's decision is they did not want to have
18 the individual defendants bear the financial burden of a
19 judgment, which is why the amounts that they found against the
20 individual defendants was quite small at least vis-a-vis what
21 they ordered against the -- the corporate defendants.

22 To have someone like Arnold Eilert -- and again, we'll
23 get to the double counting later -- whether it's \$2,500 or
24 \$5,000 to then be held responsible for a \$4 million fee, I
25 would submit would be inequitable. I think this is a case

1 where it cries out for apportionment based on the respective
2 liability of the defendants. And so to the extent your Honor
3 awards any attorneys' fees we would ask that they be
4 apportioned based on each defendant's percentage of overall
5 liability.

6 THE COURT: Thank you.

7 MR. RITCHIE: Nothing, your Honor.

8 THE COURT: All right.

9 MR. MOSIER: Briefly, your Honor, if I may?

10 THE COURT: Thank you very much.

11 MR. MOSIER: Can I briefly rebut, your Honor?

12 THE COURT: No. I've got -- I've got so much to read
13 and I appreciate -- I appreciate your willingness to come back
14 and tell me more, but we're going to move on.

15 Let's see. We've got -- all right. So we have the
16 motions on behalf of the defendants. And so we have the
17 individual defendants and regarding the altering or amending
18 the judgment and then the corporate defendants.

19 So, Attorney Wilson, do you wish to go? Whoever,
20 Attorney Ritchie, I don't care...

21 MR. WILSON: I think the order we had before was for
22 him to go first.

23 THE COURT: All right. Very good.

24 MR. WILSON: That's to keep the order of the
25 numbering.

1 THE COURT: Thank you.

2 MR. RITCHIE: Thank you, your Honor.

3 This motion seeks to alter or amend the judgment in
4 two ways.

5 One is there were two numbers entered by the jury, one
6 on the trade secret count and one on the tortious interference
7 and contract count of \$1.5 million. We think that's a double
8 counting by the jury. KPM put on evidence that at most its
9 damages were \$2 million, and these were all based on an unjust
10 enrichment theory that related to failed made by Blue Sun
11 during its lifetime. But there was no evidence to support a
12 \$3 million entry of judgment against Blue Sun, and it's clear
13 that the jury just simply answered and provided that number
14 under both counts, because that's what it thought its duty was
15 to do, but we don't think there can be a double counting
16 against Blue Sun. These were duplicative damage awards. And
17 so when judgment is entered in this case, there should only be
18 one number entered against Blue Sun, and that's \$1.5 million.

19 I think -- I'm not sure I completely understand the
20 KPM response, and I'm sure they'll speak for themselves. I
21 think we have some form of agreement on that. I think KPM's
22 position is the finding of liability on both counts shouldn't
23 be reversed, and I'm not -- we're not seeking that. But with
24 respect to the \$1.5 million entered twice, we don't think
25 that's right, and the Court should alter the judgment that way.

1 With respect to ITG, the Court may recall that
2 Dr. Zoltowski, plaintiff's expert, opined that the total amount
3 of unjust enrichment damages that were available to KPM against
4 ITG were \$1,143,127, and that was taking into account all sales
5 and all profits made by ITG during the time that Blue Sun was
6 in existence.

7 There was also a \$211,000 consequential damage number
8 that Mr. Olson testified to that I think had to do with hiring
9 employees and trying to replace people that had left, something
10 like that. So -- but the jury in this case came back and
11 awarded \$1.8 million against ITG under the tortious
12 interference contract count, which is about \$600,000 or so more
13 than what KPM asked for. That number doesn't bear any rational
14 relationship to Dr. Zoltowski's testimony. No one testified to
15 that number. There's no way to get to that number based on
16 what Dr. Zoltowski said. And so we think that the Court should
17 do the following, which is to enter judgment against ITG in the
18 amount of \$1,143,127 plus half of the \$211,000 number. I'm
19 trying to be fair about this. It seems reasonable that that
20 number could be split -- can't be entered twice against ITG and
21 Blue Sun, but could be split between these two defendants, and
22 again I apologize for the math, but whatever those two numbers
23 add up to, that's what we think that amount -- I think I have
24 it in our papers. It's -- I have it as \$1,248,127. I mean I
25 hope that's right. I think it's approximately right. So that

1 would be the number of Dr. Zoltowski's damages plus half of
2 that \$211,000 number. That number conforms with the evidence
3 and -- and quite frankly, KPM goes through some pretty
4 interesting mental gymnastics to try to justify the 1.8. They
5 say, well, you know, there was a 55/45 split and that comports
6 with this 65 -- 65/35 split between ITG and -- and Blue Sun
7 with respect to the sales, but those numbers have nothing to do
8 with one another. That's apples and oranges.

9 Then there's some suggestion, I think, that there
10 could have been joint and several liability. By the way,
11 that's a -- that's a theory that was never pled in this case.
12 It was a question that was not submitted to the jury and
13 neither was the alter ego of piercing the corporate veil
14 question ever suggested to the jury. So that can't provide a
15 basis for that number. So we think a rational reduction of
16 that amount down to the number for ITG in the \$1.2 million
17 range makes sense.

18 Thank you.

19 THE COURT: Thank you.

20 All right.

21 MS. ZACHARAKIS: Good afternoon, your Honor. Attorney
22 Paige Zacharakis representing the plaintiffs.

23 I'll first address the defendants' motions first, and
24 then we'll go through the -- the plaintiff's math, if you will,
25 of what the -- the final monetary damages that the plaintiff is

1 proposing.

2 So, first, I can confirm that the plaintiff is not
3 seeking to double count here. The damages awarded by
4 or -- they're not seeking to double count the damages awarded
5 by the jury against the defendants.

6 For example, the \$20,000 the jury awarded against
7 Irvin Lucas is \$20,000. We're not seeking \$20,000 for his
8 breach of contract and another \$20,000 for the misappropriation
9 of trade secrets. It is just the \$20,000 as the compensatory
10 damages. And that's how the plaintiff reads the jury verdict.

11 So to the extent -- to the extent that the Court
12 believes that the jury verdict needs to be modified to
13 represent that understanding, then plaintiff doesn't oppose,
14 but we believe that the jury verdict is clear that it's not to
15 double count those damages.

16 And what the plaintiff does oppose relates mainly to
17 the entity defendants' motion for remitter, which is
18 Motion No. 5, and what Mr. Ritchie was just speaking to.

19 Again, plaintiff is not seeking to double count the
20 jury's -- jury's awards against Blue Sun, that 1.5 million.

21 But in order for the defendants to argue a successful
22 motion for remitter of the 1.8 and the \$1.5 million figure, the
23 First Circuit has determined that they must meet a heavy burden
24 of showing that the award is grossly excessive, inordinate,
25 shocking to the conscience of the Court, or so high that it

1 would be a denial of justice to permit it to stand, which the
2 defendant -- the entity defendants have not done.

3 The defendants provided little explanation as to why
4 the jury award should be remitted based on the First Circuit
5 precedent, and their argument appears on page 6 of their memo,
6 which is ECF 250. It essentially said what Mr. Ritchie just
7 said, that Mr. Zoltowski didn't ask for the 3.3 million
8 or -- and the 1.8 million split with ITG and 1.5 split to Blue
9 Sun; and, therefore, it should be remitted.

10 However, the total amount of damages granted against
11 the entity defendants was the \$3.3 million. It's only about
12 \$127,000 short of the total amount that KPM's expert presented
13 at trial. And that \$127,000 difference is not grossly
14 excessive, and the difference could be justified with something
15 as simple as the jury wanted to use round numbers. The jury's
16 free to make its own allocation, and it's not bound to follow
17 the suggestion of KPM's expert.

18 The purpose of Mr. Zoltowski's presentation to the
19 jury was to assist the jury in evaluating the complexities of
20 the damages evidence that was presented at trial. The jury was
21 allowed to accept all, some, or none of Mr. Zoltowski's
22 calculations.

23 And Mr. Ritchie says that the plaintiff's
24 interpretation of the \$1.8 million split and the \$1.5 million,
25 the 55 and 45 percent, is some sort of mental gymnastics. I

1 disagree. I think it makes sense if the jury decided that
2 \$3.3 million should be the total award against the entity
3 defendants that they would evaluate a 55/45 percent split to
4 the 3.3 million taking into consideration the 65 percent that
5 ITG accepts in -- for every analyzer that Blue Sun sells.

6 So the entity defendants' argument for remitter in
7 their papers is that plaintiff's expert did not ask for the
8 exact number of the jury -- that the jury awarded so that does
9 not meet the high burden of establishing that the jury award
10 was grossly excessive. Without meeting the high burden that
11 would justify a remitter in this case, the instant defendants'
12 motion for remitter should be denied.

13 Now, from there I'd like to go into an explanation
14 what the final judgment is that the plaintiffs are seeking, and
15 I think we've all kind of mentioned how our math skills might
16 not be the best, so to help, I have created a demonstrative
17 that goes through the math of what the plaintiff or the
18 breakdown of what plaintiff is asking for.

19 If I may approach the bench?

20 THE COURT: Certainly. Do you want to just put it on
21 the screen?

22 MS. ZACHARAKIS: Sure, we can do that.

23 THE COURT: All you have to do is just put it, and
24 we'll put it on the overhead projector.

25 Could you do that, Marty?

1 THE CLERK: Yeah.

2 MR. MAGEE: We can do it that electronically, too.

3 THE COURT: Yeah, stop showing off. We've got the --
4 we've got that thing. Let's use that thing.

5 MR. WILSON: Dust it off here.

6 THE COURT: Thank you.

7 No, we use it all the time. Not everyone comes in
8 with a team of IT, so.

9 All right. So let's see what we've got.

10 MS. ZACHARAKIS: So in total plaintiff is seeking
11 \$11,790,793.50 against the defendants before assessing the
12 attorneys' fees, costs, and interests. It's broken down as
13 follows.

14 So as you can see, on the fourth box we are seeking
15 \$6,248,293.50 against Blue Sun/ITG jointly and severally. And
16 that is based on either a piercing of the corporate veil theory
17 or a vicarious liability theory; and in support of that, there
18 was evidence that was submitted at trial showing that ITG set
19 up Blue Sun to be the sales arm of the company. After ITG set
20 up Blue Sun, Blue Sun became the main distributor, not the sole
21 distributor, of ITG's M5 analyzer. Blue Sun did not sell any
22 other analyzers, other than those manufactured by ITG.

23 Mr. Wilt is the owner of ITG. He's the sole manager
24 of Blue Sun. Blue Sun is the sole member of -- or ITG is the
25 sole member of Blue Sun; therefore, under the *Consolis Finance*

1 SJC decision, ITG should be vicarious- -- held vicariously
2 liable for Blue Sun's portion of the damages assessed against
3 it; or in the alternative, if the Court is so inclined, to
4 pierce the corporate veil, as Attorney Magee has explained.

5 Now, these numbers, that \$6,248,293.50 figure is based
6 on the following math. So Blue Sun was found liable on Counts
7 One, Two, Seven, and Ten. Those are the --

8 THE COURT: All right. I'm going to just interrupt
9 you right here. Okay. I can do the math because I can do this
10 with a calculator.

11 MS. ZACHARAKIS: All right. Perfect.

12 THE COURT: How -- why would I be able to assess a
13 compensatory damage award for two violations that were not put
14 before the jury regarding Idahoan and R&R Machine?

15 MS. ZACHARAKIS: So those were in relation to the
16 violation of the preliminary injunction --

17 THE COURT: Right.

18 MS. ZACHARAKIS: -- and that --

19 THE COURT: Was there an action that was sought before
20 the Court to -- for some type of a damage award for that, for
21 violation of the preliminary injunction? Was there a
22 new -- was there an amendment to the complaint to include those
23 as counts that could be tried and then -- or even on a separate
24 case?

25 MS. ZACHARAKIS: Yeah. So these amounts were not

1 tried, but we -- the plaintiff was not aware of --

2 THE COURT: The action wasn't tried. There was no
3 litigation. I didn't make a ruling on R&R or Idahoan as it
4 violating a preliminary injunction. I mean, if another -- I
5 don't know if there was -- if there had been a legal
6 determination by a judge, a judicial determination on either of
7 those prior to the trial.

8 MS. ZACHARAKIS: There have not, those two specific.

9 THE COURT: Those are -- will not be considered as
10 part of compensatory damages. They were not litigated. And I
11 mean maybe you can still litigate them or they should have been
12 encompassed in the litigation, but they were not litigated. So
13 they will not be considered as part of any award, so.

14 MS. ZACHARAKIS: Understood.

15 I will say that the -- the information of the Idahoan
16 and the R&R sales are in the trial record.

17 THE COURT: Sure, of course they're in the trial
18 record. So are other things. But this was a jury trial on
19 specific issues, and the jury was given very specific
20 constructions, and they made determinations, and then
21 they -- and they did -- and I -- we have the -- here we have
22 their -- their notes regarding, you know, asking the Court for
23 further instruction on certain things. It was not put to the
24 jury. It wasn't even put to the judge as a -- as a jury waived
25 portion. So it's not -- there's not going to be compensation

1 for things that were not litigated here.

2 MS. ZACHARAKIS: Okay.

3 THE COURT: And so we will take the math. I'd rather
4 hear the logic besides the math. I get it. I understand it.
5 And I'm glad that there's -- that it wasn't intended to be
6 double, that we're talking about the same actions. I think it
7 references the jury verdict and the amounts awarded is a
8 juror's reflection that they believe ITG, i.e., Mr. Wilts, was
9 just as responsible as Blue Sun in that entity on the things
10 that they found for them. So that is very important to the
11 Court, and I will make the calculations based on that, but --

12 MS. ZACHARAKIS: Okay. Understood, your Honor.
13 Understood.

14 THE COURT: All right. And I -- I haven't made a
15 determination yet against the 93A or any other double or
16 trebling. It's helpful to get information about if there's
17 been some argument that you think mischaracterizes the reason
18 that you're seeking. I mean it's certainly helpful talking
19 about the attorneys' fees. We will -- we will assess those and
20 take those into account. We also -- it will be very helpful
21 for us when we're talking about things like whether -- you
22 know, the assessment of attorneys' fees after a certain
23 determination by the jury or the Court, and those we also will
24 take into account.

25 We're talking about a lot of numbers here, a lot, and

1 we're talking about numbers for different things in each, and
2 I -- I'm not sure how I'm actually going to handle the
3 assessment on the individuals, but the individuals will not be
4 severally liable for the million-dollar verdicts. They will be
5 liable for their own verdict and the -- and the assessments
6 against them.

7 So the individual defendants were not found to be
8 liable for \$3 million or \$1.5 million, and they
9 will -- but -- but Blue Sun is -- and Blue Sun stands in
10 the same place as ITG, at least certain assessments.

11 MS. ZACHARAKIS: Your Honor, I'd just add that the
12 plaintiff agrees with you, and as we flip to the second page
13 which displays the individual defendants.

14 As you'll see here what we're asking for is the
15 compensatory damages.

16 THE COURT: Okay.

17 MS. ZACHARAKIS: Is the compensatory damages amount
18 adding the exemplary damages under misappropriation of trade
19 secrets, which is a plus two times. And then you see here on
20 the last column, we're asking that the individual defendants be
21 severally liable for each of these amounts.

22 THE COURT: All right. And we have that -- is that
23 something that you filed with one of the -- one of the
24 submissions? I don't know if we have that.

25 All right. So can we have a copy of that?

1 MS. ZACHARAKIS: Yes.

2 THE COURT: Thank you.

3 MS. ZACHARAKIS: Moving on from the demonstrative,
4 I'll just add that we are seeking that the judgment against
5 ITG, the severally imposed; however, the amount assessed
6 against Blue Sun should be jointly and severally imposed with
7 ITG. That's essentially what the plaintiffs are asking for
8 here.

9 And the last thing I'll add is just that the
10 plaintiffs believe that the interest rate that should be
11 applied is the 12 percent, which is set by the statute.

12 Otherwise, in summary, the plaintiff does not oppose
13 the modification of the jury verdict if the Court so -- if the
14 Court is inclined to agree with the defendants, and that needs
15 to be clear that there is no double counting.

16 The defendants' motion for remitter should be denied
17 because they have not met that burden.

18 The final judgment should be -- and the plaintiff's
19 position outlined as it is in the demonstrative, but we
20 understand the Court's position on it, and that a 12 percent
21 interest rate should be applied across all of the defendants'
22 damages.

23 Thank you.

24 THE COURT: Thank you, counsel.

25 MR. RITCHIE: Briefly, your Honor.

1 I can do it from here, if that's okay.

2 THE COURT: Okay. That's fine.

3 MR. RITCHIE: First of all, we're not -- we are
4 moving -- I should have said this before. We're moving both
5 for alter or amendment of the award under Rule 59(e) as well as
6 for remitter under rule -- well, both rules.

7 The alter amendment doesn't require the shocking of
8 the conscience or some kind of, you know, outstanding, you
9 know, crazy award. It requires simply that the Court conform
10 the -- the entry of judgment with the evidence.

11 Now, with respect to Blue Sun, I take it from
12 plaintiff graph where they're asking for \$1.5 million in
13 compensatory damages that they agree with that.

14 And with respect to ITG, we would say again, your
15 Honor, that the 1.8 million number bears no rational
16 relationship to the evidence for the testimony from
17 Mr. Gutkoski. There's a bigger point here. I'm not -- I want
18 to move on, because plaintiffs have now put up on the board
19 this language joint and several liability. Your Honor will
20 recall from the very first day of this trial, we filed a motion
21 to keep out arguments about piercing the corporate veil, about
22 alter ego.

23 THE COURT: There's no piercing of anything in this
24 courtroom.

25 MR. RITCHIE: Well, I understand that, but I --

1 THE COURT: Ears or otherwise. And so -- and as far
2 as the -- I heard the arguments about the assessment against
3 Blue Sun and the assessment against ITG. I'm going to take
4 your arguments, and I'm going to read it, but that may not be
5 my ruling. That -- I'm going to -- I'm going to try the best I
6 can to end up with respect for the jurors' work as long as it
7 aligns with the case law and reasonableness. I'm going to try
8 and keep in mind on the outside that this is not about a
9 punishment. This is about some judicial and legal recognition
10 of a harm and then a -- and then the award to recognize that
11 harm. And all points I intend to work toward something
12 that -- that will address what have been the concerns,
13 especially going forward, but also with an undertaking of a
14 real goal of making sure that everyone walks away understanding
15 that this is not a judgment about people. It is a judgment
16 about action that was legally recognized and will be
17 compensated appropriately in conjunction with the law and the
18 issues of fairness to the best that we can do. And then -- and
19 then where you all go from there could be to somewhere else,
20 and I respect that I have two bosses.

21 One is right on my shoulder in the First Circuit, and
22 the other is further away and may never get it, but they could.
23 Since there's multiple levels, I'm sure that the
24 arguments -- you have really good lawyering here. Let's face
25 it, really good lawyering. We're lucky to have both sides well

1 represented, and the filings have been immensely helpful.
2 That's why I have been able to ask what I think are smart
3 questions, because they prepared them for me and -- but also I
4 think we're going to get to something that looks in the end
5 kind of what should have happened. And I don't take any of the
6 arguments whatsoever in any spirit other than the one it was
7 given, which is you're advocates, and you're supposed to, and
8 that's the way it works. So I will be as fair as I can.

9 And, Attorney Ritchie, if you all disagree with it you
10 can always bring post-trial motions asking me to reconsider
11 what I've done or to correct what appears to be an error. I'm
12 not -- I don't have any ego about that.

13 MR. RITCHIE: That's fine, your Honor. I just want to
14 make sure that your Honor's consideration considers the claims
15 that were actually pled and pursued in this case and not new
16 matters that have come as --

17 THE COURT: Well, and I think I have demonstrated
18 that. I'm not -- you know, I'm not going to take on a burden
19 that we don't have to take on. And not only that, I shouldn't.
20 I shouldn't. That's an issue that was not litigated, the
21 issues related to the preliminary injunction issues. That's
22 something completely separate.

23 And so with all of that said, the very, very
24 significant amount of -- of guidance for us from both parties
25 and then we will work through and get -- we're hoping -- I'm

1 hoping we thought about we could the end of the month. I'm
2 hoping by the end of October, we certainly get out our
3 findings. Okay. Certainly within 45 days.

4 All right. Thank you all very much. I appreciate all
5 of your patience and all of your hard work on behalf of each
6 one of your clients. All right.

7 COUNSEL IN UNISON: Thank you, your Honor.

8 THE COURT: All right. Thank you.

9 And, Attorney Ritchie, you sort of got the last word,
10 so I'm just going to let the record reflect that.

11 (At 12:51 p.m., court was adjourned.)
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C E R T I F I C A T E

I, Marianne Kusa-Ryll, RDR, CRR, do hereby
certify that the foregoing transcript is a true and accurate
transcription of my stenographic notes before the Honorable
Margaret R. Guzman, to the best of my skill, knowledge, and
ability.

/s/ Marianne Kusa-Ryll

11/10/23

Marianne Kusa-Ryll, RDR, CRR

Date

Official Court Reporter